44TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { EX. DOC. No. 173.

EXTRADITION TREATY WITH GREAT BRITAIN.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

IN RESPONSE TO

A resolution of the House of Representatives adopted March 30, 1876, in relation to the case of Ezra D. Winslow, and the accompanying papers.

JUNE 10, 1876.—Referred to the Committee on Foreign Affairs and ordered to be printed.

To the House of Representatives:

I transmit herewith, in answer to the resolution of the House of Representatives of the 30th day of March last, a report from the Secretary of State, with accompanying papers, which presents the correspondence and condition of the question up to the day of its date.

U. S. GRANT.

WASHINGTON, *June* 10, 1876.

DEPARTMENT OF STATE,
Washington, June 10, 1876.

The Secretary of State has the honor to report that upon the 31st day of March, ultimo, he received a copy of a resolution of the House of Representatives in the following words:

Resolved, That the Committee on Foreign Affairs be instructed to inquire if there be any conflict of construction between the government of Great Britain and the United States in reference to the extradition treaty of 1842, and whether any, and, if any, what, legislation is proper by Congress to remove any difficulties, if such exist, in the execution of said treaty. And the committee is authorized to call upon the Secretary of State for all recent correspondence touching the subject of this inquiry.

In the month of February, 1876, one Ezra D. Winslow, charged with extensive forgeries and the utterance of forged paper, committed within the jurisdiction of the United States, being found in Great Britain, was apprehended, pursuant to the terms of the tenth article of the treaty of August 9, 1842.

Thereafter the evidence of the criminality of the fugitive was heard, and being sufficient, he was duly committed, for extradition, upon the 3d of March, ultimo, in the city of London.

The requisition for his surrender was duly made on the part of the Government of the United States, and every requirement of the treaty was complied with; nevertheless the government of Great Britain has declined to surrender the fugitive, unless the Government of the United States would give certain stipulations or make certain guarantees, not contemplated or provided for by the treaty between the two governments.

In addition to Winslow, there are two other fugitive criminals in London, charged with forgery and the uttering of forged paper, for whom demand has been made, and who have also been duly committed for extradition pursuant to the treaty, but whom the government of Great Britain in like manner declines to deliver up.

The application for the discharge of Winslow and Brent has been adjourned to June 15. In the case of Gray, the time for his detention has not expired. The correspondence called for by the resolution of the House of Representatives, up to the present date, with certain accompanying papers and documents, is herewith respectfully submitted, and will show the points in difference between the two governments with regard to their respective rights and duties under the extradition clause of the treaty of 1842.

Respectfully submitted.

HAMILTON FISH.

To the PRESIDENT.

List of papers.

Mr. Fish to General Schenck, February 12, 1876.
General Schenck to Mr. Fish, February 15, 1876.
Mr. Fish to General Schenck, February 17, 1876.
Same to same, No. 845, February 17, 1876.
Same to same, No. 849, February 21, 1876.
General Schenck to Mr. Fish, March 2, 1876.
Mr. Fish to General Schenck, March 3, 1876.
General Schenck to Mr. Fish, No. 884, March 2, 1876.
Mr. Hoffman to Mr. Fish, No. 36, March 4, 1876.
Same to same, No. 39, March 10, 1876.
Mr. Fish to Mr. Hoffman, No. 864, March 31, 1876.
Same to same, April 5, 1876.
Mr. Hoffman to Mr. Fish, No. 61, April 8, 1876.
Same to same, April 13, 1876.
Same to same, No. 62, April 13, 1876.
Mr. Fish to Mr. Hoffman, No. 874, April 21, 1876.
Mr. Hoffman to Mr. Fish, April 27, 1876.
Mr. Fish to Mr. Hoffman, April 28, 1876.
Memorandum of a conversation between Sir Edward Thornton and Mr. Fish, April 30, 1876.
Mr. Hoffman to Mr. Fish, May 1, 1876.
Mr. Fish to Mr. Hoffman, May 2, 1876.
Mr. Hoffman to Mr. Fish, May 2, 1876.
Same to same, May 3, 1876.
Same to same, No. 76, May 4, 1876.
Same to same, No. 79, May 6, 1876.
Same to same, No. 82, May 11, 1876.
Same to same, May 12, 1876.
Same to same, No. 84, May 13, 1876.
Same to same, May 20, 1876.
Mr. Fish to Mr. Hoffman, May 20, 1876.
Mr. Hoffman to Mr. Fish, May 22, 1876.
Mr. Fish to Mr. Hoffman, No. 887, May 22, 1876.
Same to same, No. 890, May 24, 1876.
Mr. Hoffman to Mr. Fish, No. 95, May 25, 1876.
Same to same, May 26, 1876.

Mr. Fish to General Schenck.

[Telegram.]

WASHINGTON, *February* 12, 1876.

E. D. Winslow, charged with large forgeries, escaped by steamer Rotterdam, under name of Clifton, and is said to be in London. Obtain arrest if possible, and advise Department promptly.

FISH,
Secretary.

General Schenck to Mr. Fish.

[Telegram.]

LONDON, *February* 15, 1876.

Winslow arrested. Send charge with proof at once.

SCHENCK.

Mr. Fish to General Schenck.

[Telegram.]

WASHINGTON, *February* 17, 1876.

Officer, with papers for Winslow's extradition, sails Saturday.

FISH,
Secretary.

Mr. Fish to General Schenck.

No. 845.] DEPARTMENT OF STATE,
Washington, February 17, 1876.

SIR: Information of a trustworthy character having reached this Department that one Ezra D. Winslow, charged with the commission of

the crime of forgery in the State of Massachusetts, is now under arrest in London, awaiting extradition, I have to request you, pursuant to the provision of the tenth article of the treaty of 1842, between the United States and Great Britain, to make application to the proper authorities for the delivery of said Winslow into the custody of Mr. Albion P. Dearborn, who is duly authorized to receive the criminal, and to bring him back to the United States for trial.

Mr. Dearborn, who is provided with the necessary papers in the case, sails at once for London, and will present himself at the legation.

I am, &c.,

HAMILTON FISH.

Mr. Fish to General Schenck.

No. 849.] DEPARTMENT OF STATE,
Washington, February 21, 1876.

SIR: A conversation occurred on the 17th instant, between Sir Edward Thornton and myself, in reference to the course which might be adopted by the British government on a demand being preferred for the extradition of Winslow on the charge of forgery.

Sir Edward suggested that if his surrender were requested it might be refused unless a stipulation was entered into that the fugitive should not be tried upon any offense other than that for which he was extradited.

Whether this course, if adopted, grows out of the proceedings in the Lawrence case, or from a desire to make the extradition treaty between the United States and Great Britain subject to the provisions of the British extradition act of August 9, 1870, I cannot say.

You will remember that this act in section 3, under the head of "Restrictions on Surrenders of Criminals," provides that no criminal shall be surrendered unless provision is made by the law of the foreign state, or by arrangement, that the fugitive shall not be tried for any offense "other than the extradition crime proved by the facts on which the surrender is grounded."

If the course adverted to be caused by the Lawrence case, it may be well to say that it is believed that Lawrence has not, up to this time, been arraigned for any other than the extradition offense, and that no representation has been made to this Government on the question.

If such a course is taken for any other reason, it may be said that Great Britain has on more than one occasion tried surrendered criminals on offenses other than those for which they were extradited, and such trials afford a practical construction of the scope of the treaty and of the power and rights of either Government as understood and applied by Great Britain for a period of nearly thirty years after the ratification thereof; and I cannot imagine that it will be claimed by Great Britain that either party to a treaty may at will, and by its own municipal legislation, limit or change the rights which have been conceded to the other by treaty, and have been practically admitted for such length of time.

I would also call your attention to the twenty-seventh section of the act of 1870, (ch. 52, 33, 34 Vict.,) repealing former acts under which extradition had theretofore been made; this section expressly excepts everything contained in the act inconsistent with the treaties referred to in the repealed acts, among which is the treaty with the United States. It seems to have been clearly the intent of Parliament not to

apply to that treaty any of the provisions of the act inconsistent with the treaty, as it had existed and been enforced for nearly thirty years.

While I hope that no such demand will be made as intimated, you will object to any such stipulation being asked, and, should it be insisted upon, you will decline to give it, and, if necessary, telegraph to the Department for further instructions.

I am, &c., &c.,

HAMILTON FISH.

General Schenck to Mr. Fish.

[Telegram.]

LONDON, *March* 2, 1876.

Lord Derby calls attention to third clause, subsection two, of extradition act, and declines to give up Winslow unless promise is made by law or by arrangement that he shall be tried only for the extradition crime.

SCHENCK.

Mr. Fish to General Schenck.

[Telegram.]

WASHINGTON, *March* 3, 1876.

The treaty of extradition between the United States and Great Britain admits no right in either party to exact conditions beyond those expressed in the treaty. The promise now asked in regard to Winslow is not in accordance with the treaty, and cannot be given. You will request the surrender of the fugitive on the terms of the treaty.

FISH,
Secretary.

General Schenck to Mr. Fish.

No. 884.] LEGATION OF THE UNITED STATES,
London, March 2, 1876.

SIR: Referring to your dispatch No. 845, and to my telegram of this date, I have the honor to inclose to you a copy of a note I have received from Lord Derby upon the subject of the surrender of Winslow.

Before receiving this note, though subsequent to its date, I had applied in the usual form for the surrender of the accused. Winslow was brought before the sitting magistrate to-day, the necessary proofs and papers were put in, and the prisoner was remanded till to-morrow to await notice from the foreign office that his surrender had been demanded by the United States Government.

I have, &c., &c.,

ROBT. C. SCHENCK.

[Inclosure 1 in 884.]

FOREIGN OFFICE, *February* 29, 1876.

SIR: I have the honor to state to you, that I have been informed by Her Majesty's secretary of state for the home department, that the chief magistrate of the Bow

street police-court issued, on the 13th instant, upon the information of Colonel Chesebrough, of the United States legation, warrants for the apprehension, under the 8th section, clause second of the extradition act, 1870, of Ezra D. Winslow, who is accused of the crime of forgery within the jurisdiction of the United States of America.

Her Majesty's secretary of state for the home department, in communicating this to me, has drawn my attention to the third clause subsection 2 of the act, which is as follows:

"A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded."

And has inquired whether any provision has been made by the law of the United States or by arrangement that Winslow, if surrendered, shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offense committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

The secretary of state for the home department fears that the claim advanced by your Government to try Lawrence in the recent case of extradition, with which you are familiar, for crimes other than the extradition crime for which he was surrendered, amounts to a denial that any such law exists in the United States; while the disclaimer by your Government of any implied understanding existing with Her Majesty's government in this respect, and the interpretation put upon the act of Congress of August 12, 1842, chapter 147, section 3, preclude any longer the belief in the existence of an effective arrangement, which Her Majesty's government had previously supposed to be practically in force.

The secretary of state for the home department is accordingly compelled to state that, if he is correct in considering that no such law exists, he would have no power, in the absence of an arrangement, to order the extradition of Winslow, even though the extradition crime for which he has been arrested were proved against him, and the usual committal by the magistrate ensued thereupon.

I have thought it right to lose as little time as possible in calling your attention to the intimation which I have thus received from Her Majesty's secretary of state for the home department; and I have the honor to request that you will bring the circumstances to the knowledge of your government, in order that means may be found for the solution of the present difficulty.

I have the honor, &c.,

DERBY.

Mr. Hoffman to Mr. Fish.

No. 36.] LEGATION OF THE UNITED STATES,
London, March 4, 1876. (Received March 20.)

SIR: Referring to your dispatch No. 845, I have the honor to inform you that Winslow was committed for extradition on the 3d instant, on the several charges of forgery, and on the several charges of uttering forged paper, as set forth in the indictment. Colonel Chesebrough, who has had this matter in charge, has taken great pains to see that the mistake made by the solicitor employed in the Lawrence case should not be repeated.

In this connection I have to acknowledge your telegram of yesterday and to say that I shall at once address a note to Lord Derby in pursu ance of your instructions.

I have, &c.,

WICKHAM HOFFMAN.

Mr. Hoffman to Mr. Fish.

No. 39.] LEGATION OF THE UNITED STATES,
London, March 10, 1876. (Received March 24.)

SIR: Referring to your dispatch No. 849, in relation to the extradition of Winslow, I have the honor to inclose to you herewith a copy of a note

which I received last evening from Lord Derby, dated March 8, and also a copy of a note which I addressed to him upon the same day. Having reason to believe that Her Majesty's government are determined to adhere to the position taken by them, and refuse to give up Winslow, unless a law or arrangement is made that he shall be tried only for the extradition crime, upon the ground that the extradition act of 1870 leaves them no choice in the matter, I addressed my argument, as you will observe, principally, to show that the act does not apply to the treaty, and I referred especially to the 27th section, (ch. 52, 33, 34,) to which you called my attention.

I have, &c.,

WICKHAM HOFFMAN.

[Inclosure 1 in No. 39.]

Lord Derby to Colonel Hoffman..

FOREIGN OFFICE,
March 8, 1876. (Received March 9, 1876.)

SIR: I referred to Her Majesty's secretary of state for the home department General Schenck's notes of the 1st and 2d instant, applying for the surrender to the United States officer authorized to receive him, of Ezra D. Winslow, charged with having committed certain crimes within the jurisdiction of the United States of America; and I have the honor to inform you that, the requisite proof having been laid before him, the chief magistrate of the Bow street police-court has formally committed Winslow to prison, and Mr. Cross has forwarded to Sir Thomas Henry his order, under section 8 of the extradition act, 1870, signifying that a requisition has been made for the surrender of the prisoner.

The chief magistrate will, upon the committal being completed, forward to Mr. Cross a certificate of such committal, together with his report upon the case, and nothing would, in the ordinary course of things, remain but for Her Majesty's secretary of state for the home department, at the expiration of the fifteen days prescribed in the eleventh section of the act of 1870, to issue his warrant for Winslow to be surrendered to the person duly authorized to receive him. But, in view of the difficulty created in consequence of what has recently occurred in the case of Lawrence, as well as the positive enactment of section 3, subsection 2, of the extradition act of 1870, quoted in the second paragraph of my note to General Schenck of the 29th ultimo, Her Majesty's government do not feel themselves justified in authorizing the surrender of Winslow until they shall have received the assurance of your Government that this person shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offense committed prior to his surrender other than the extradition crimes proved by the facts on which the surrender would be grounded; and I have the honor to request that you will communicate this decision to your Government, in order that some arrangement may be come to in the matter.

I have, &c.,

DERBY.

[Inclosure 2 in No. 39.]

Mr. Hoffman to Lord Derby.

LEGATION OF THE UNITED STATES,
London, March 8, 1876.

MY LORD: Referring to your note to General Schenck of February 29, upon the subject of the extradition of Winslow, in which you state that the secretary of state for the home department may come to the conclusion that he has no power to surrender the fugitive, even though the usual committal by the magistrate should take place, I have the honor to inform you that I have received a communication from my Government upon this subject. Mr. Fish states, not having then received a copy of your lordship's note, but only a telegram from General Schenck, that he is at a loss to understand upon what ground the possible action of Her Majesty's government, as foreshadowed in that communication, is based.

If it is founded on a desire to make the extradition treaty of 1842 between the United States and Great Britain subject to the extradition act of 1870, he is unable to find anything in that treaty which admits the right of either party to exact conditions beyond those expressed in the treaty. If, on the other hand, it is based, as I infer from your lordship's note, upon the reported action of my Government in the Lawrence case, I am authorized by Mr. Fish to say that at the date of his dispatch Lawrence had not been arraigned for any other crime than the extradition crime, and that no representation had been made to my Government upon this subject. In your lordship's note you refer to the clause of the act of 1870, which forbids the surrender of a fugitive criminal, unless provision is made by law, or by arrangement, that he shall be tried only for the extradition crime proved by the facts upon which the surrender is granted. But may I be permitted to call your lordship's attention to the 27th section of the same act, (ch. 52, 33 and 34 Vict.,) repealing the former acts under which extradition had theretofore been accorded?

This section, probably suggested by the foreign office, excepts everything contained in the act inconsistent with the treaties referred to in the repealed acts, among which treaties is that with the United States. And I am enabled to call your lordship's attention to a case in the court of the Queen's Bench, *ex parte* Bouvier, in which it was argued by the attorney-general, in reference to this section, that the intention of Parliament was to make a general act which should apply to all cases, except when there was anything inconsistent with the treaties referred to, and that the provision limiting the crime for which the trial might be had, being inconsistent with the treaty, *the condition so imposed did not apply to the treaty,* and the lord chief-justice (Cockburn) further observed, "I rather hesitate to express a decided opinion as to the construction to be put upon the 27th section, although I see plainly what was the intention of the legislature; that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their *full integrity and force.*" The "full integrity and force" of the treaty of extradition between the United States and Great Britain has been clearly shown and settled by an unbroken operation of nearly thirty years, during which time Great Britain has, at least upon one occasion, *tried surrendered* criminals for crimes other than those for which they have been surrendered, and has thus afforded a practical construction of the scope of the treaty, and of the powers and rights of both governments. I sincerely hope that Her Majesty's government, upon a further consideration of this matter, will be able to hold, with that eminent jurist, the lord chief-justice, that the desire of the legislature to save the treaties in "their full integrity and force" has been effected, and that they will decide, as he states that he should have done, had it been necessary, "that this object has been accomplished." I know that Her Majesty's government is as anxious as we are that criminals should not escape the just punishment of their crimes, by taking refuge on a foreign shore; and it would assuredly be a sad thing for the interest of both countries, and in that of humanity, if a treaty which has worked so well for nearly thirty-five years, to our mutual advantage and to the furtherence of justice, should now be permitted to fall to the ground, and great criminals, on both sidesof the Atlantic, be thus enabled to escape "unwhipt of justice."

I have, &c.,

WICKHAM HOFFMAN.

Mr. Fish to Mr. Hoffman.

No. 864.] DEPARTMENT OF STATE,
Washington, March 31, 1876.

WICKHAM HOFFMAN, Esq., &c.,

SIR: Referring to previous correspondence in reference to the extradition of Winslow, in custody in London, I have now to acknowledge the receipt of your No. 39, under date of March 10, inclosing a note addressed to you by Lord Derby, of March 8th and your reply of the same day.

With General Schenck's No. 884 was inclosed a note from Lord Derby, dated February 29th, in which it was stated that Her Majesty's secretary of state for the home department had drawn attention to subsection two of the third section of the British extradition act of 1870, and feared that the claim by this Government of the right to try Lawrence, (who had been recently surrendered,) for crimes other than that for

which he had been extradited, amounts to a denial that any such law as is referred to in the British act exists, and the disclaimer of this Government of the existence of any implied understanding in respect to trials for crimes other than extradition crimes, together with the interpretation put upon the act of Congress of August 12, 1842, (which is doubtless an error for 1848,) preclude any longer the belief in the existence of an effective arrangement which Her Majesty's government had previously supposed to be practically in force, and it was added that the secretary of the home department was compelled to state that if he were correct in considering that no such law exists, he would have no power, in the absence of an arrangement, to order the extradition of Winslow, even although proper proceedings had been taken for that purpose.

Lord Derby called General Schenck's attention to the intimation which he had received from the home department, and requested that the matter be brought to the knowledge of this Government.

It is to be remarked, however, that in this note the foreign office, as distinguished from the home office, expressed no opinion on the question involved, but confined itself to requesting that the views of the home office might be communicated to this Government.

A few days later, however, on the 8th of March, Lord Derby assumes the more advanced position previously occupied only by the home department, and writes as follows: "Her Majesty's government do not feel themselves justified in authorizing the surrender of Winslow until they shall have received the assurance of your Government that this person shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offense committed prior to his surrender other than the extradition crimes proved by the facts on which the surrender would be grounded," and requesting that this decision be communicated to this Government.

To his note you made reply under date of March 8, referring to the general practice for many years under the treaty, and calling attention to the construction given to the twenty-seventh section of the act of 1870 in the case of Bouvier.

No further correspondence has reached this Government, and the matter rests upon this note of Lord Derby and your reply.

The reasons given by Lord Derby for the course intimated in his note, arise, as he states, from what had taken place in this country in the Lawrence case, and the positive terms of section three, subsection two, of the British extradition act of 1870.

Moreover, it has been stated that the home office had even gone further, and expressed the opinion that, not only had some implied understanding been reached as to the particular crime for which Lawrence should be tried, but that it would be in violation of the law of the United States, and of the general laws of extradition of all countries, to try any prisoner for any other crime than the particular extradition offense for which he had been surrendered.

With regard to any such understanding, either expressed or implied by any authorized declaration or engagement of this Government, no evidence is adduced; none can be adduced. This Government asked the surrender of Lawrence, precisely as it has asked the surrender of all other fugitives who have been delivered by Great Britain under the treaty of 1842, complying on its part with the requirements of the treaty; and neither by expression nor by implication, entering into any "arrangement;" but simply requiring the fugitive to be "delivered up to justice." It furnished such evidence of criminality, as according to the laws of

Great Britain, where the fugitive was found, would have justified his apprehension and commitment for trial, if the crime or offense had been there committed.

Great Britain recognized the compliance by this Government with all that the treaty required, and delivered the fugitive up to justice.

The allusion made by the home office to the case of Lawrence needs possibly a passing remark.

Charles L. Lawrence is charged with a series of forgeries whereby the Government of the United States claims to have been defrauded to an amount not far short of two millions of dollars on custom-house entries. He is supposed to have numerous and influential confederates, both in this country and in England, who are suspected of having shared in the spoils resulting from these alleged frauds upon this Government.

A large number of indictments have been found against Lawrence, and proceedings either civil or criminal are either pending or imminent against supposed accomplices. It is supposed that prosecution of these cases might possibly disclose names on either side of the Atlantic, in connection with the alleged frauds, not yet brought before the public.

In the spring of 1875 Lawrence fled and escaped to Europe, and was arrested, under the assumed name of Gordon, at Queenstown, on a requisition for his surrender under the treaty. There were proved (as I am informed) before Sir Thomas Henry, in London, twelve or thirteen distinct charges of forgery, each on papers connected with a different invoice of goods. The representatives of this Government supposed the extradition was made on all the charges; but the letter or report of Sir Thomas Henry to the British home office led to the issue of a warrant of surrender of Lawrence on the single charge of forging a bond and affidavit, on which warrant the keeper of the jail delivered Lawrence to the agent appointed by the President to receive him; the terms of the warrant were not known to any agent or officer of this Government (as is represented to me) until long after Lawrence's return to the United States. His counsel and friends appear to have been apprised of the fact, that although proof was presented on some twelve or thirteen charges of forgery, the warrant of surrender seems to be confined to the forging a bond and affidavit. Up to this date Lawrence has been arraigned only upon one indictment, based on the forgery of the bond and affidavit mentioned in Sir Thomas Henry's report to the home office, and he has not been arraigned for any offense other than the extradition crimes proved by the facts in evidence before Sir Thomas Henry, and on which his surrender was based.

Although not arraigned on any other indictment than for the forgery for which he was extradited, the British home office has raised the question that he may possibly be tried upon other charges and for other crimes.

It seems, therefore, that the home office of Great Britain undertakes to decide what is the law of the United States as well as of Great Britain, and assumes that the law of the United States, as well as general law of extradition and the extradition act of Great Britain, prevents the trial of a criminal surrendered under the treaty of 1842 for any offense other than the particular offense for which he was extradited; and the position which it takes involves the assumption that, in demanding an extradition under the treaty, the United States is bound by the provisions of the act of 1870, whether in conflict with the treaty or not, and it claims to have "supposed" that an "effective arrangement was in force," that no criminal so surrendered should be tried

for any other than the particular extradition offense; on the faith of which arrangement it is claimed that surrenders have heretofore been made, and without which it is now said that a surrender would not be possible under an English act; but as already said nothing is adduced in support of the belief of the existence of such supposed arrangement.

These positions are so different from the understanding of this Government, and so opposed to the views which it was supposed were entertained by Great Britain, and which have been recorded in parliamentary papers, which have been asserted in diplomatic correspondence, and been recognized in judicial decisions in that as in this country, and set forth by writers on extradition law, that I learn from Lord Derby's note, with surprise equal to my regret, that they appear to be supported by the foreign office.

The act of August 12, 1848, reproduced in the Revised Statutes, (sections 5270 to 5276,) referred to in the correspondence, does not affect or limit the rights of the two governments on the question.

This act is simply a general act for carrying into effect treaties of extradition. It provides the machinery, and prescribes the general mode of procedure, but does not assume to determine the rights of the United States, or of any other state, which are governed wholly by the particular provisions of the several treaties, nor to limit or construe any particular treaty.

In some few treaties between the United States and foreign countries, provisions exist that the criminal shall not be tried for offenses committed prior to extradition, other than the extradition crime, and in others no such provision is included.

Again, under some treaties, the citizens or subjects of the contracting powers are reciprocally exempt from being surrendered, while others contain no such exception. The United States act of 1848 is equally applicable to all these differing treaties. If the surrendered fugitive is to find immunity from trial for other than the offense named in the warrant of extradition, he must find such immunity guaranteed to him by the terms of the treaty, not in the act of Congress. The treaties which contain the immunity from trial for other offenses have been celebrated since the date of the act of 1848.

At that date the United States had treaties of extradition only with Great Britain and with France, neither of which contained the limitation referred to.

The terms of the respective treaties alone define or can limit the rights of the contracting parties.

The construction of the treaty between the United States and Great Britain, by the two Governments, and their practice in its enforcement for many years were in entire harmony. In each country surrendered fugitives have been tried for other offenses than those for which they had been delivered; the rule having been that, where the criminal was reclaimed in good faith, and the proceeding was not an excuse or pretense to bring him within the jurisdiction of the court, it was no violation of the treaty, or of good faith, to proceed against him on other charges than the particular one on which he had been surrendered. The judicial decisions of both countries affirm this rule. It was so held in a case of inter-state extradition by Judge Nelson, in Williams *vs.* Bacon, 10 Wendell, 636, and the same principle was laid down by the court of appeals of New York, in a late case of Adriance *vs.* Lagrave, who had been delivered up under the treaty with France. In United States *vs.* Caldwell, (8 Blatchford Cir. Ct. Rp., 131,) Caldwell, after ex-

tradition from Canada for forgery in 1871, was indicted for bribing an officer; and the plea was entered that the prisoner was brought within the jurisdiction of the court upon a charge of forgery, under the treaty, and that the offense specified in the indictment was not mentioned in the treaty. A demurrer being interposed, the court decided the prisoner had been extradited in good faith, charged with the commission of a crime, and must be tried.

In the case of Burley, extradited from Canada on a charge of robbery, the prisoner was tried on assault with intent to kill.

In the case of Hielbronn, who was extradited from this country for forgery, and tried in Great Britain for larceny, the facts, as stated by the solicitor-general of Great Britain who had charge of the proceedings, and who was examined before the late British commission on the extradition question, were, that the prisoner being extradited for forgery, was acquitted, and was thereupon tried and convicted for larceny, an offense for which he could not have been surrendered, not being enumerated in the list of crimes mentioned in the treaty.

In Canada there is the same current of authority.

In the case of Von Earnam, (Upper Canada Reports 4 C., p. 288,) the prisoner was surrendered by the United States to Canada upon the charge of forgery, and application was made for release on bail on the ground that the offense was, at most, the obtaining of money under false pretences and not within the treaty. Macauley, C. J., said, in denying the motion, that he was disposed to regard the offense as forgery, but even if the offense were only false pretences, after "being in custody, he is liable to be prosecuted for any offense which the facts may support."

In Paxton's case, (10 Lower Canada Jurist, 212, 11, 352,) the prisoner was charged with uttering a forged promissory note. He pleaded that he had been extradited upon the charge of forgery, and could not be tried for uttering forged paper, or for any other than the extradition offense. The court decided that the trial should proceed. The prisoner thereupon protested against being called upon to plead to any other charge than that for which he was extradited, but he was tried, found guilty, and the conviction affirmed on appeal.

In addition to the foregoing, Judge Benedict, in his opinion in Lawrence's case, delivered within a few days past, entirely coincides in these views, and the Solicitor-General of the United States, in his opinion in Lawrence's case, dated July 16, 1875, reaches the same conclusions.

An examination of the report of the select committee on extradition of the House of Commons, which sat in 1868, under whose superintendence the extradition law of 1870 was framed, and which was composed of some of the most distinguished public men of Great Britain, among whom were the solicitor-general, Mr. Mill, Mr. Forster, Sir Robert Collier, and Mr. Bouverie, shows that the law of the United States, and the practice in regard to extradition, were perfectly well understood, and they are distinctly referred to on several occasions.

Mr. Hammond, now Lord Hammond, for many years under-secretary of state, in speaking of Burley's case, stated, that as it was suggested that the prisoner, who had been surrendered on a charge of robbery, was about to be tried for piracy, the matter had been referred to the law-officers of the crown, and that it was held that if the United States put him *bona-fide* on his trial for the offense for which he was extradited, it would be difficult to question their right to try him for piracy, or any other offense of which he might be accused, whether such offense was or was not a ground of extradition, or even within the treaty; and

added, "We admit in this country that if a man is *bona-fide* tried for an offense for which he was given up, there is nothing to prevent his being subsequently tried for another offense, either antecedently committed or not." (Answer 1036.)

Mr. Mullens, an eminent member of the bar, who was counsel in the Lawrence case, in reply to a question of Sir Robert Collier, said that, in his opinion, a surrendered criminal ought to be tried for an offense other than the extradition offense arising from the same facts; and Mr. Foster, (question 1214,) considering the propriety of the proposed stipulation, that a person should be tried for no offense other than the extradition offense, said:

> The Americans do not make that stipulation, or else you would not have been able to try Hielbronn for another offense. To which Mr. Mullens responded: "No; there is no stipulation of that kind in the case of America."

Mr. Mill thereupon said, (question 1216:)

> "As I understand it, the treaty with America would not prevent our trying a man for a different offense from that for which he had been given up." To whichMr. Mullens replied: "It would not; there is no stipulation that he shall not be tried for any other offense." Then follows question 1217, "Would you wish to extend that state of things to other countries?" and the reply "with regard to America, I have never found any difficulty about it," &c.

So far as can be ascertained there was absolutely no dissent at any time from these views as to the law and practice under the treaty, and the only question seemed to be whether it was wise to attempt to change them.

Mr. Clark, (an eminent British authority,) in his Treatise on Extradition, says:

> It is quite clear that neither the treaty nor the law of the United States contains the provisions of the extradition act of 1870.

It would appear, therefore, by the judicial decisions, by the practice of both governments, and by the understanding of the persons most familiar with proceedings in such cases, and the most competent to judge, that where a criminal has been in good faith extradited for an offense within the treaty, there is no agreement, express or implied, that he may not also be tried for another offense of which he is charged, although not an extradition offense. He is, in fact, (in accordance with the language of the treaty,) "delivered up to justice;" and in the absence of any limitation by treaty, to "justice" generally; each independent state being the judge of its own administration of justice. Surely, Great Britain will not allow the legislature of another state to prescribe, or to limit the cases, or the manner in which justice is to be administered in her courts, and she will not expect the United States to be less tenacious of its independence in this regard.

Now, for the first time since the signing of the treaty of 1842, Great Britain raises the question of her right to demand from the United States, as a condition of the execution by Great Britain of her engagement to surrender a fugitive criminal charged with a series of stupendous forgeries, a stipulation or agreement not provided for in the treaty, but asked on the ground that an act of Parliament, passed some twenty-eight years after the treaty had been in force, prescribes it as one of the rules or conditions which should apply to arrangements for extradition, when made with a foreign state.

This involves the question whether one of the parties to a treaty can change and alter its terms or construction or attach new conditions to its execution without the assent of the other—whether an act of the Parliament of Great Britain, passed in the year 1870, can change the

spirit or terms of a treaty with the United States of nearly thirty years anterior date, or can attach a new condition, to be demanded of the United States before compliance by Her Majesty's government with the terms of the treaty, as they have been shown to have been uniformly understood, and executed by both governments, for the third of a century.

As this Government does not recognize any efficacy in a British statute to alter or modify, or to attach new conditions to the executory parts of a previously-existing treaty between the United States and Great Britain, I do not feel called upon to examine particularly the provision of the law of 1870. But inasmuch as Great Britain seeks to impose the provisions of that act upon the United States in the execution of a treaty of many years' anterior date, I do not fail to observe that, while by the act Great Britain assumes to require that no surrendered fugitive shall be tried in the country which demands his extradition for "any offense other than the extradition crime," (in the singular,) proved by the facts on which the surrender is grounded, she reserves to herself the right to try the fugitive surrendered to her for such crimes (in the plural) as may be proved by the facts on which the surrender is grounded.

This does not seem to be wholly reciprocal, and if the United States were disposed to enter into a treaty under this act, it might expect some greater equality of right than a cursory examination of this provision in the act seems to provide.

It is quite well known that after the passage of the act of 1870 an effort was made to enter into a treaty with Great Britain which should enlarge the number of extradition offenses, and otherwise extend the provisions of the existing treaty.

At the outset it was apparent that the act of 1870 was not an act to carry into effect treaties or conventions for extradition, as is the United States act of 1848, but one providing a system to which all subsequent treaties of extradition must be adapted, and which could be applied to enforce treaties or arrangements made subject to its provisions.

This Government was unable to agree to any arrangement based on the provisions of the act of 1870, and in a note addressed to Sir Edward Thornton, the British minister, under date of January 27, 1871, he was informed that "this Government understands the twenty-seventh section of the extradition act of 1870 as giving continued effect to the existing engagements for the surrender of criminals. Imperfect as they are, in view of the long conterminous frontier between British North America and the United States, we must be content to suffer the inconvenience, until Parliament shall put it in the power of Her Majesty's government to propose a more comprehensive and acceptable arrangement."

The British government was thus distinctly and formally advised of the position and of the views of the United States, and no exception thereto has been expressed.

A further effort to effect a treaty was made in 1873, after the passage by the British Parliament of an act amending the act of 1870, which resulted in failure, for precisely similar reasons.

This failure to negotiate a new treaty arose solely because the United States could not accept as part of it some of the provisions of the act of 1870, and preferred to go on under the treaty of 1842, as theretofore construed, and practically carried into effect by each government; and thus we have proceeded up to the present time.

In support of the construction which this Government in 1871, in the note to Sir Edward Thornton above referred to, gave to the twenty-seventh section of the extradition act, it appears that when the Court

of Queen's Bench was called to pass upon the very question, in the case of Bouvier, 27 Law Times, N. S., 844, the attorney-general stated that the intention had been to make a general act, which should apply to all cases except where there was anything inconsistent with the treaties referred to. So far as the point was passed on, the lord chief-justice expressed the opinion that it was the intention, while getting rid of the statutes by which the former treaties were carried out, at the same time to save those treaties in their full integrity and force, and that the result had been accomplished. One of the other justices thought the question somewhat doubtful, and the third agreed with the chief justice.

The Solicitor-General of the United States, in his opinion in Lawrence's case, given in August of last year, reached the same conclusion, that the treaty was not affected by the act.

It cannot readily be believed that Parliament intended by the act of 1870 to claim the right to alter treaties in existence without notice to the other government, or to impose new conditions upon foreign governments seeking extraditions under treaties in existence prior to that act.

The United States has declined to become subject to the British act of 1870, and with knowledge of this the government of Great Britain has continued constantly to ask and obtain extraditions under the treaty of 1842, and since the refusal of the United States to negotiate a new treaty under the provisions of that act.

Since the passage of the act of 1870 Great Britain has obtained from this Government some thirteen warrants of extradition, and has instituted a much larger number of proceedings to obtain extradition. In no instance has Great Britain thought it necessary to tender any such stipulation as she now asks from the United States, or to present her requests for extradition in any way different from that in which they were presented prior to 1870. The United States in the same time have instituted numerous proceedings, and at this moment have three criminals in London in custody upon charges of forgery, whose extradition this Government is seeking in the usual manner provided by the treaty.

During this period no intimation has reached this Government that the treaty of 1842 was not in full force, or that the act of 1870 was claimed to limit its operation, or to impose upon this Government the necessity either of changing its laws, or of giving stipulations not known to the provisions of the treaty, and not heretofore suggested, nor has any representation been made to this Government, by that of Great Britain, on account of any proceedings taken in the case of Lawrence, mentioned in the opinion attributed to the home office, in the note of Lord Derby to General Schenck, before referred to.

But now, with three important cases pending in London at the present time for extradition, in one of which, at least, all the formalities have been complied with, we are informed in substance that it had been supposed up to the present time by the British home office that our law as to trials for other than extradition offenses was in agreement with the law of 1870; but finding it to be otherwise, we are confronted with the requirement of a stipulation in order to obtain what is guaranteed by the treaty of 1842, whereby the United States must recognize the right of the British Parliament, by statute, to change existing executory treaties, and to impose upon this Government conditions and stipulations to which it had not given its assent.

As relates to the particular case of the fugitive Winslow, there is not, so far as I am aware, any intention of trying him for any offenses other

than those on which indictments were transmitted, and for which his surrender was demanded; but the United States will give no stipulation of which the treaty does not authorize the demand.

As the stipulation or condition is demanded by Great Britain as a right, the right of the demand must be established.

The President regrets that a condition which, in his judgment, is without any justification under the treaty, should have been asked. He regards the question thus presented as of a grave and serious character, on the final solution of which must probably depend the continuance of the extradition article of the treaty of 1842. He cannot recognize the right of any other power to change at its pleasure, and without the assent of the United States, the terms and conditions of an executory agreement in a treaty solemnly ratified between the United States and that power. He thinks that the twenty-seventh section of the British act of 1870 was specially intended to exempt the treaty with the United States from the application of any of the new conditions or provisions embodied in that act, and to leave that treaty to be construed, and the surrender of fugitives thereunder to be made, as had been previously done.

He hopes that, on a further consideration, Her Majesty's Government will see, in the section referred to, the effect which he supposes it was designed to have.

But he recognizes that it is for the British government to construe and enforce it own statutes; and should Her Majesty's government finally conclude that the British Parliament has attached a new condition to the compliance by that government of its engagement with the United States under the tenth article of the treaty of 1842, relating to extradition, requiring from the United States stipulations not provided for or contemplated in the treaty, he will deeply regret the necessity which will thereby be imposed upon him, and does not see how he can avoid regarding the refusal by Great Britain to adhere to the provisions of the treaty as they have been reciprocally understood and construed from its date to the present time, or the exaction by that government of a condition heretofore unknown, as the infraction and termination of that provision of the treaty.

You are not authorized to enter into any stipulation or understanding as to the trial of Winslow, in case he be delivered up to justice. His surrender is asked under and in accordance with the provisions of the tenth article of the treaty between the United States and Great Britain of the 9th of August, 1842. He is charged with a crime included within the list of crimes enumerated in the treaty; that crime was committed within the jurisdiction of the United States, and he has sought an asylum and been found within the territories of Great Britain, and the United States have produced such evidence of his criminality as, according to the laws of Great Britain, would justify his apprehension and commitment for trial if the crime or offense had been committed in Great Britain.

You will communicate the substance of this to Lord Derby, and should he desire it, you may read it him.

I am, sir, your obedient servant,

HAMILTON FISH.

Mr. Fish to Mr. Hoffman.

[Telegram.]

WASHINGTON, *April* 5, 1876.

HOFFMAN,
Chargé, London:

* * * * * * *

A full reply to your thirty-nine is on the way. It may be advisable to receive it before question is decided; especially if adverse.

FISH, *Secretary.*

Mr. Hoffman to Mr. Fish.

No. 61.] LEGATION OF THE UNITED STATES,
London, April 8, 1876. (Received April 20.)

SIR: Referring to previous correspondence upon the same subject, I have the honor to inform you that Winslow has not yet been surrendered to the United States; neither have I as yet received an answer to my note of Lord Derby of March 8. On receipt of your telegram day before yesterday, I called upon Lord Tenterden, who, in the absence of Lord Derby, is in charge of the foreign office, and told him that further instructions in the case of Winslow were on the way to me, which I should probably be able to communicate to him early next week. He said that he would so inform the home office.

I have, &c.,

WICKHAM HOFFMAN.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *April* 13, 1876.

FISH, *Secretary, Washington:*

Lord Derby asks if district court has power to try Lawrence for crimes not named in warrant? If so, withdraws proposal for arrangement. Sees no remedy except in act of Congress. Proposes to renew negotiations for new treaty. States that Winslow must be released May second. Copy note sent to-day.

HOFFMAN,
Chargé.

Mr. Hoffman to Mr. Fish.

No. 62.] LEGATION OF THE UNITED STATES,
London, April 13, 1876. (Received April 25.)

SIR: I have the honor to inclose to you a copy of a note which I received this morning from Lord Derby.

His lordship refers to a telegram from New York which appeared in the Daily News of the 29th ultimo, and which he has ascertained from Her Majesty's legation at Washington to be substantially true, to the effect that the United States district court for the southern district of

New York had decided that the forger Lawrence can be tried for other crimes than those mentioned in the warrant, and inquires whether the district court at New York has the power to carry out this decision.

In case that it has such power, Lord Derby thinks that it would be nugatory to enter into such an arrangement as he proposed in his note of the 8th ultimo, and sees no solution of the present difficulty except through an act of Congress.

Lord Derby further requests me to express to you the hope of Her Majesty's government that the negotiation of a new treaty of extradition, which may be beneficial to the interests of both nations, may be renewed as soon as possible, and in conclusion calls my attention to the twelfth section of the act of 1870, to the effect that a fugitive cannot be detained in custody beyond two months from the date of his committal, unless the Secretary of State can show sufficient cause for further detention, and adds that, therefore, however much Her Majesty's government may regret not being able to comply with the wishes of the Government of the United States, they will be unable to detain him in custody beyond that specified time.

The two months expire on the 2d proximo.

I have, &c.,

WICKHAM HOFFMAN.

[Inclosure with No. 62.]

Lord Derby to Colonel Hoffman.

FOREIGN OFFICE, *April* 11, 1876.

SIR: With reference to previous correspondence respecting the extradition of Ezra D. Winslow, and especially to the letter I had the honor of addressing to you on the 8th ultimo, in which I stated to you, for the information of the United States Government, that Her Majesty's government would not feel themselves justified in authorizing the surrender of that prisoner until they should have received the assurance of your Government that he should not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offense committed prior to his surrender, other than the extradition crimes proved by the facts on which the surrender would be grounded, I have now the honor to call your attention to the inclosed copy of a telegram which appeared in the Daily News, of the 29th ultimo, and which I have ascertained from Her Majesty's legation at Washington to be substantially correct; and to request that you will be good enough to ascertain from your Government, for the information of Her Majesty's government, whether the district court at New York has the power to carry out the decision it is reported to have arrived at, viz, that the forger Lawrence, who was surrendered to the United States Government under the 10th article of the treaty of 1842, can be tried for other offenses besides those mentioned in the warrant.

In this country the Attorney-General would enter a *nolle prosequi*, and so put a stop to further proceedings in any prosecution; but Her Majesty's government are not aware whether the Attorney-General of the United States has similar powers. The reported language of the district court leads them to think that he has not.

If so, it would, in the opinion of Her Majesty's government, be nugatory to enter into an arrangement such as I had the honor of proposing in my letter to you of the 8th of March, above alluded to; and Her Majesty's government see no solution of the present difficulty but the passing of an act of Congress which, while recognizing the acknowledged principle of international law that a fugitive can only be tried for the crime or crimes for which he was surrendered, will enable the Government of the United States to guarantee that the condition, which Her Majesty's government are compelled to require under section 3, subsection 2, of the act of 1870, will be complied with.

With regard to future difficulties which may possibly arise on the general subject of extradition, Her Majesty's government can see but one satisfactory solution, namely, the conclusion of a more comprehensive treaty between the two countries, and one more suited to the requirements of the day than the existing arrangement.

I have, therefore, to request that you will express to your Government the hope of Her Majesty's government that the negotiation of a treaty which will be so beneficial to the interests of the two nations may be renewed as soon as possible.

In conclusion, I have the honor to remind you that, under the provisions of the twelfth section of the extradition act of 1870, a fugitive cannot be detained in custody longer than two months from the date of his committal, unless the Secretary of State can show sufficient cause for further detention; and that, therefore, however much they may regret being unable to comply with the wishes of your Government respecting the surrender of Winslow, they will be unable to detain him in custody beyond that specified time.

I have, &c.,

DERBY.

[Daily News, March 29.]

NEW YORK, *Tuesday, 28th.*

The United States district court of New York has decided that the forger, Lawrence, who was brought from England under the extradition treaty, can be tried for other offenses besides those mentioned in the warrant. The court cannot regard the order of the President to the contrary, or take notice of any agreement between the English and American Governments to that effect.

Mr. Fish to Mr. Hoffman.

No. 874.] DEPARTMENT OF STATE,
Washington, April 21, 1876.

SIR: Referring to my instructions, No. 864, of the 31st ultimo, as to the case of Winslow, whose extradition has been demanded by the United States under the treaty of 1842, I have to state that two cases in which the Canadian authorities have been called upon to pass upon the very point now under consideration, have come to the notice of the Department, one of which has occurred since that instruction was addressed to you. Of these it seems proper that you should be informed in connection with the general question.

I inclose a memorandum in relation to the case of Rosenbaum, who was extradited from Canada in 1874, and an extract from a dispatch received to-day from Mr. Dart, the consul-general of the United States in Canada, stating the conclusions to which the Canadian authorities have arrived in the case of Charles Worms, who has been delivered up within a very few days past upon a demand made on February 21, 1876.

The Department has not had an opportunity of examining the opinions in these cases, but you will perceive that the conclusions reached appear to fully agree with the position taken by this Government.

Should the question be still open, it would seem that the decisions in these cases should be brought to the attention of the government of Great Britain.

I am, &c.,

HAMILTON FISH.

[Inclosures.]

1. Memorandum in the case of Rosenbaum.
2. Extract. Mr. Dart to Mr. Cadwalader, April 18, 1876, No. 348. (See page 56.)

[Inclosure 1, in No. 874.]

Memorandum.

In the case of Rosenbaum, whose extradition was asked from Canada, January 14, 1874, on a charge of arson, and the warrant for whom was issued in January, 1874, the question that the British act of 1870 applied was raised and discussed, as well as the

general question of the right to try an offender for any offense other than the extradition crime. The court examined this ground assumed by the prisoner's counsel, and reference was made to the arguments and judgment in the previous case of Bouvier in the Queen's Bench. The prisoner was committed for extradition, and, in so doing, Ramsay, J., said: "Notwithstanding the plausibility of this reasoning, it fails to convince me. In the first place it goes too far, for if it were recognized as a principle of international law that a prisoner extradited could only be tried for the crime for which the extradition took place, it would not have been necessary for the Imperial Parliament to make these provisions, and it would not be necessary to ask this question. I am not, however, aware that it has ever been laid down in England that a man once within the jurisdiction of English courts could set up the form of his arrest, or the mode by which he came into custody, as a reason for his discharge when accused of a crime. But even were this otherwise, it is not the international law that it is sought to prove, but the special requirement of a new statute. Now, I cannot conceive how a new provision of the act of 1870 could be consistent with the treaties with France, the United States, and Denmark entered into years before."

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *April* 27, 1876.

FISH, *Secretary, Washington:*

If Winslow gets before Queen's Bench on *habeas corpus*, am I to employ counsel? Shall not intervene unless instructed.

HOFFMAN, *Chargé.*

Mr. Fish to Mr. Hoffman.

[Telegram.]

WASHINGTON, *April* 28, 1876.

HOFFMAN, *Chargé, London:*

Counsel on *habeas corpus* seems impracticable in present condition of the case. You will present to Lord Derby copy of eight sixty-four, with a note referring to your previous oral communication thereof, and stating that you do so under instructions, in a final hope of still preserving the treaty, and in the further hope that he may see therein sufficient cause to prevent the discharge of Winslow, and to order his surrender under the tenth article of the treaty of eighteen forty-two, in accordance with the requisition of this Government.

You will further state, in substance, that although the United States does not recognize the statute of eighteen seventy as controlling extradition under our treaty, still, as Great Britain claims to be governed thereby, you hope that his lordship will see in the twelfth section authority for his intervention to cause the surrender in accordance with the treaty.

FISH, *Secretary.*

Memorandum of a conversation between Sir Edward Thornton and Mr. Fish, April 30.

Sir Edward Thornton states that the British Cabinet in regular meeting yesterday, (April 29,) have had under consideration the extradition case of Winslow; and that Lord Derby instructed him to say that he

regretted that they had been obliged to adhere to the opinion previously expressed in his notes to the United States *chargé*, and that Winslow would be discharged on Wednesday next unless the Government of the United States would give assurance that he should not be tried for any offense other than that on which the extradition should be made.

Mr. Fish expressed regret at this decision, and explained to Sir Edward Thornton that the charges against Winslow were for offenses against State laws, and the indictments against him were found in the courts of the State of Massachusetts, not in the Federal courts; and that, without regard to any question of policy, or of right to ask any stipulation or assurance, the President could not restrain the jurisdiction of the courts of any one of the States over offenses against the law of that State, and, therefore, he could not enter into any promise or assurance restricting the power of a State to try a criminal within its jurisdiction for any crime for which he may have been indicted in that State.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *May* 1, 1876.

FISH, *Secretary, Washington:*

Informed by foreign office Winslow will be discharged on third, unless arrangement made. Reply to note promised in few days. Have asked he may be detained till answer received and communicated to you. Meantime matter will come up in Parliament.

Copy eight sixty-four sent Lord Derby Saturday, with note.

HOFFMAN.

Mr. Fish to Mr. Hoffman.

DEPARTMENT OF STATE,
Washington, May 2, 1876.

HOFFMAN, *Chargé, London:*

You were not instructed or authorized to make the request stated in your telegram of first.

FISH,
Secretary.

[Telegram.]

Mr. Hoffman to Mr. Fish.

LONDON, *May* 2, 1876.

Winslow applies for *habeas corpus* to-morrow. British government will oppose his immediate release. Shall not intervene unless instructed. Papers asked for in House of Commons; refused for the present.

HOFFMAN.

[Telegram.]

Mr. Hoffman to Mr. Fish.

LONDON, *May* 3, 1876.

Winslow applied for discharge. Attorney-general opposed. Case adjourned ten days.

HOFFMAN.

Mr. Hoffman to Mr. Fish.

No. 76.] LEGATION OF THE UNITED STATES,
London, May 4, 1876. (Received May 15.)

SIR: I have the honor to inclose to you copies of all important correspondence which has passed between the British government and this legation on the subject of the extradition of Winslow, since the 20th ultimo.

* * * * * * *

I have, &c.,

WICKHAM HOFFMAN.

[Inclosure No. 1 with No. 76.]

Mr. Hoffman to Lord Derby.

LEGATION OF THE UNITED STATES,
London, April 29, 1876.

My LORD: Referring to my note of the 20th instant, I have the honor to inclose to you herewith, under the instructions of Mr. Fish, a copy of his dispatch of March 31, upon which my note was based.

I beg to assure your lordship that both Mr. Fish and I understand and appreciate the sad circumstances which have prevented your lordship from receiving me, with a view to my reading to you the dispatch of Mr. Fish.

In forwarding this dispatch, I am instructed to say that it is done in the hope of still preserving the treaty, and with the further hope that your lordship will find therein sufficient cause to prevent the discharge of Winslow, and to order his surrender under the 10th article of the treaty of 1842, and in accordance with the requisition of the United States. I am further instructed to say that, while my Government cannot recognize the act of eighteen hundred and seventy as controlling extradition under the treaty, still, as Her Majesty's government claims to be bound thereby, Mr. Fish hopes that your lordship will see in the 12th section of that act authority for your intervention to cause the surrender of Winslow in accordance with the treaty.

I have, &c.,

WICKMAN HOFFMAN.

The right honorable the EARL OF DERBY, *&c., &c., &c.*

[Inclosure No. 2 in No. 76.]

Lord Derby to Mr. Hoffman.

FOREIGN OFFICE,
April 27, 1876.

SIR: With reference to your note of the 20th instant, I have the honor to state to you that the question of the extradition of Winslow and of the other two persons now in custody, on the requisition of the United States Government, has been again considered by Her Majesty's government, and that they have come to the conclusion that it will not be in their power to surrender the prisoners unless an assurance is given by the United States Government that they will not be tried in the United States for any offense committed prior to their surrender, other than the extradition crimes proved by the facts on which the surrender would be granted.

The period allowed by law for the detention of Winslow expires on the 3d of May, and for that of Brent and Gray on the 28th of May and 21st of June respectively, and they cannot be detained after those dates unless good cause can be shown by Her Majesty's secretary of state for the home department for their further detention.

I shall have the honer of sending a detailed answer to your note in a few days, but I have thought it right to inform you at once of the decision of Her Majesty's government, in order that you may have time to communicate with your Government before the release of the prisoner Winslow.

I have the honor, &c.,

DERBY.

[Inclosure No. 3 in No. 76.]

Mr. Hoffman to Lord Derby.

LEGATION OF THE UNITED STATES,
London, May 1, 1876.

MY LORD: Referring to your note of the 11th of April, and to mine of the 20th, I have the honor to request that your lordship will take such steps as shall lead to the detention of the fugitive Winslow in custody until I shall have received your lordship's answer to my note, and have had time to communicate it to Mr. Fish, and to receive his instructions in reply.

I make this request in the interest of justice, and with the earnest hope that means may be found of settling the question unfortunately in dispute between our two governments, and of thus preserving the treaty, and avoiding the turning of great criminals loose upon society to recommence their career of crime.

I have, &c.,

WICKHAM HOFFMAN.

[Inclosure No. 4 with No. 76.]

Immediate.

FOREIGN OFFICE, *May* 1, 1876.

SIR: I have the honor to acknowledge the receipt of your note of this day's date, requesting that steps may be taken for the detention of the fugutive Winslow in custody for a further period; and I beg leave to state to you, in reply, that I have referred your note to Her Majesty's secretary of state for the home department.

I have, &c.,

TENTERDEN,

In the absence of the Earl of Derby.

[Inclosure No. 5 with No. 76.]

Pressing.

FOREIGN OFFICE, *May* 2, 1876.

SIR: With reference to my letter of yesterday, I have the honor to inclose for your information a copy of a notice, just received from the home office, which has been addressed to that department by Messrs. Wontner & Sons, solicitors, stating that an application will be made to-morrow at twelve o'clock to a judge at chambers for the issue of a writ of *habeas corpus* in ths case of E. D. Winslow.

In forwarding this notice, the secretary of state for the home department has informed me that he will endeavor to show cause why the prisoner should not be set at liberty, but that he is unable to guarantee the result.

I have, &c.,

TENTERDEN,

In the absence of the Earl of Derby.

(Copy.)

IN THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION.

In the matter of Ezra D. Winslow, a prisoner in the house of detention under the extradition warrant of commitment.

We hereby give you notice that we shall to-morrow, at 12 o'clock, apply to a judge at chambers, by counsel, for an order for the discharge of the above-named Ezra Dyer Winslow, or for a writ of *habeas corpus* directing the governor of the House of Deten-

tion, Clerkenwell, in the county of Middlesex, to bring up the body of Ezra Dyer Winslow, in order that he may be discharged from custody, he having been in custody under an extradition warrant of committal since 3d March last.

Dated this 2d day of May, 1876.

Yours, &c.,

WONTNER & SONS,

3 *Cloak Lane, Canada Street, Solicitors for the said Ezra Dyer Winslow.*

[Inclosure No. 6 in No. 76]

Lord Derby to Mr. ———.

FOREIGN OFFICE, *May* 3, 1876.

SIR: With reference to my letter of yesterday's date, I have the honor to inform you that an application was made this morning before Baron Pollock by Winslow's solicitor for his release, but that, on a statement from Her Majesty's attorney-general that negotiations on the subject were going on between Her Majesty's government and the United States Government, the judge remanded the case for ten days.

I have, &c.,

DERBY.

[Inclosure No. 7 in No. 76.]

Mr. Hoffman to Lord Derby.

LEGATION OF THE UNITED STATES,
London, May 3, 1876.

MY LORD: Referring to our correspondence upon the subject of Winslow, and especially to my note of the 20th instant, I have the honor to call your lordship's attention to two recent decisions in Canada, which have been sent me by Mr. Fish, with instructions to communicate them to you.

Your lordship will perceive that the conclusions reached by the Canadian courts in both cases appear fully to agree with the position taken by the United States Government in this matter.

I have, &c.,

WICKHAM HOFFMAN.

Mr. Hoffman to Mr. Fish.

No. 79.] LEGATION OF THE UNITED STATES,
London, May 6, 1876. (Received May 17.)

SIR: Referring to previous correspondence upon the subject of Winslow, I have the honor to forward to you herewith a copy of a note I received last evening from Lord Derby.

I have, &c.,

WICKHAM HOFFMAN.

[NOTE.—As instruction No. 864, of March 31, had been delivered to Lord Derby and a request made that it be substituted for a note addressed to him by Mr. Hoffman communicating it, this is taken as a reply to 864.]

[Inclosure in No. 79.]

Lord Derby to Mr. Hoffman.

FOREIGN OFFICE, *May* 4, 1876.

SIR: I had the honor of informing you in my note of the 29th ultimo that Her Majesty's government having again considered the question of the extradition of Winslow, and of the other two persons in custody on the requisition of the United States Government, had come to the conclusion that it would not be in their power to surrender them unless an assurance were given by the United States Government that they would not be tried for any offense other than the extradition crimes on which the surrender would be

granted, and that the prisoners could not be kept in confinement beyond the dates fixed by law for their detention.

I shall have the honor in the present note of informing you of the grounds on which this conclusion was based, and I will first consider the present position of the question as represented in the latter part of your note of the 20th ultimo, in which you state that "in 1842 a treaty for the surrender of fugitive criminals was made between the United States and Great Britain. Under it for nearly thirty years fugitives were delivered up on both sides, and tried for crimes not named in the warrant by either party, without remonstrance from the other."

While assenting to the first part of this paragraph, Her Majesty's government take exception to the second, and assert that there is no case within the knowledge of this government in which a prisoner was surrendered by England for one offense and tried by the United States for a different one.

The case of Heilbronn, where it is alleged that a prisoner was surrendered by the United States for one offense and tried for a different one here, was a private prosecution, and no evidence can be found of the attention of the Government having been called to it.

As far, moreover, as the language of the statutes in both countries passed for the purpose of giving effect to the treaty of 1842 is concerned, it shows that though that treaty contained no express stipulations on the question of the trial of persons surrendered under it for crimes other than the extradition crimes of which they were accused before the surrendering authorities, the secretaries of state in either country were only empowered to deliver up extradition prisoners to be tried for the crime for which they had been accused in the country delivering. (See 6 and 7 Victoria, c. 76, 3, and act of Congress August, 1848, chap. 147, s. 3.)

Her Majesty's government cannot assent to the proposition that the English extradition act of 1870 imposed a new condition upon the treaty of 1842. They maintain that if that act had never been passed, it would have been the duty of Her Majesty's government, under the act of 6 and 7 Victoria, cap. 76, upon which the treaty then rested, and the general law of extradition, to have protested against any extradition prisoner being tried in the United States for crimes other than those of which he was accused in this country, and had that protest been disregarded by the Government of the United States, the British government would have been equally bound to require an assurance in any subsequent case that a prisoner would only be tried for the crime or crimes for which he was surrendered.

And while dealing with this part of the case, I would ask how the United States Government is prepared to reconcile the views expressed in your note in favor of the assertion of the right of asylum for political offenses with the principle you have been instructed to advocate.

There is no principle of international law more clearly admitted than that advanced by you that each state is judge of its own administration of justice, and with regard to the right of asylum for political offenses, it is clear that the nation surrendering is to be the judge of what is or is not a political offense, the more so because opinions differ in different countries on this question.

But if the principle contended for in your note be correct, what is to prevent the United States Government from claiming a prisoner from this government for an extradition crime and trying him afterward for an offense which in this country would be deemed a political offense, but which in the United States might be viewed under a different aspect?

Her Majesty's government believe that the only test and the only safeguard for the liberty of the individual and the maintenance of the right of asylum are to be found in the principle for which they contend, that the crime or crimes of which a man is accused in the country surrendering, which are proved against him there, and for which he is surrendered, are the only crimes for which he ought to be tried in the country claiming, and that without this safeguard the liberties of the subject and citizens of the two nations might be jeopardized and put into the power of political parties or of the vindictiveness of the receiving government, who, *ex consessis*, is not the proper judge of whether a particular offense is a political one or not. And here I must observe, with reference to your comment on the words "deliver up to justice," that if those words can be construed as having the extended meaning for which you contend, namely "deliver up to justice generally," there would be no object in having a list of extradition crimes for which alone an accused person can be claimed, and the construction would be in direct opposition to the act of Congress of August, 1848, chap. 147, sec. 3, and 6 and 7 Vict., chap. 76, sec. 3, "to be tried for the crime for which he is so accused," the word being identical in both acts.

I now proceed to consider the effect of the extradition act of 1870, and I will state at once that Her Majesty's government do not contend that any of the provisions of that act have any force or effect in any foreign state.

They look upon that act only as declaratory of the law that is to govern the British government in the matters to which it refers, and they consider that none of its provisions are inconsistent with the treaty of 1842, section 27.

It is to be regarded as intended to prevent for the future the evils that were pointed out by Mr. Hammond and others, as having occurred, and being liable to occur in private prosecutions to which the attention of government had not been called.

Her Majesty's government consider the provisions of the act as having been devised, not in the particular interests or for the particular ends of Great Britain, but as the embodiment of what was the general opinion of all countries on the subject of extradition, and as being beneficial to all and injurious to none.

That the general opinion of European nations has justified this view is proved by the acceptance, by most of the leading nations of Europe, of extradition treaties based upon its provisions.

The attention of the United States Government was drawn to the provisions of the act immediately after it became law, as is shown by Sir E. Thornton's communication to Mr. Fish of the 22d of September, 1870; and it is evident that Mr. Fish's notice was called to the effect of the restrictions of clause 3, subsection 2, from the question which he shortly afterward put to Sir E. Thornton, whether it would be possible that a stipulation could be inserted in any new convention, that if, during the trial of a person whose extradition had been asked for on a minor crime, such as larceny, evidence previously unknown should appear that a prisoner had been guilty of a higher crime, such as murder, it should be legal to try him for the latter crime. To this question Sir E. Thornton, by instruction from Her Majesty's government, returned the following answer in writing:

"That any provision in the treaty, by which a fugitive surrendered for one offense mentioned in the schedule may be tried for any offense committed prior to his surrender, other than the extradition crime for which he was surrendered, would be inadmissible. Indeed the treaty, if it is to be carried out, must contain a provision exactly to the opposite effect."

The draught of a new convention between the two countries was afterward prepared, and article VI of that draught, as it originally stood, was as follows:

"When any person shall have been surrendered by either of the high contracting parties to the other, such person shall not, until he has been restored or had an opportunity of returning to the country from whence he was surrendered, be triable or tried for any offense committed in the other country prior to the surrender other than the particular offense on account of which he was surrendered."

Although much discussion took place on different provisions of this draught convention, and considerable alterations and modifications of the original draught were proposed by the United States Government and adopted by the British government, not one word of objection was ever raised by the United States Government to article VI.

The only proposal made by them with reference to the article was the addition, at the end of it, of the words "No person shall be deemed to have had an opportunity of returning to the country whence he was surrendered until two months at least shall have elapsed after he shall have been set at liberty and free to return," which was assented to by the British government. The terms of that convention were, in fact, with one exception, virtually agreed upon by both governments; that exception was a difference which arose upon article VII relating to political offenses.

The original article was to the effect that "No accused or convicted person should be surrendered if the offense in respect of which his surrender is demanded shall be deemed by the party upon whom the demand is made to be of a political character, or if he prove to the satisfaction [of the police magistrate, or of the police judge, or commissioners named in article III of this treaty, or of the court before whom he is brought on habeas corpus, or] of the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or to punish him for an offense of a political character."

The United States Government proposed to leave out the words between brackets, and thus restrict the power of deciding as to what was a political offense to the Secretary of State alone.

To this the British government could not agree, as the effect would have been to deprive an accused of his right to *habeas corpus;* to take away from him the power of proving at once his right to be set at liberty and of taking the objection in the first instance before the tribunal before whom he was brought immediately on his arrest.

This would be contrary to the spirit of English law, entirely apart from the extradition act of 1870; would have been a direct blow to the liberties of persons claiming asylum in this country; would put it in the power of a Secretary of State to keep an accused person in prison who ought to have been set at liberty at once, and who ought to have the opportunity given him of claiming his right to be set at liberty at the very first moment that he was charged before any tribunal.

It was for these reasons that the British government declined to accede to the proposal; and, if the rights of an accused, which were well known and established in this country long before the extradition act was passed, are secured to him, there is not, as far as Her Majesty's government are aware, any other matter of difference between the two governments which would prevent that convention being signed at the present moment.

It does not, therefore, appear how, in any respect, the act of 1870 erected an insurmountable barrier in the way of a convention, as alleged in your note.

It appears, therefore, that the provisions of the extradition act of 1870 and the powers of the British government under it having thus been clearly brought to the notice of the United States Government, both countries continued, without any question, mutually to surrender persons accused of crimes within the treaty of 1842.

No case arose in either country, to the knowledge of the British government, in which any departure was made from the usual practice, and no prisoner was ever, to the knowledge of the British government, tried for any offense other than that of which he had been accused in the country surrendering.

Her Majesty's government, therefore, contend that they and their predecessors were justified in considering that, by the tacit and implied consent of each country, this practice would be continued, and that it was not necessary to ask for any positive arrangement to secure that object.

So convinced was the secretary of state for the home department that this was the case, that, when in the first instance his attention was drawn to the intention to try Lawrence for smuggling by the solicitors who had acted for him in this country, the reply given to them was, that the Secretary of State could not assume that the Government of the United States, in the face of their general understanding and in view of their act of Congress of August 12, 1848, chapter 147, section 3, would ever think of acting in a manuer so contrary to their own law and to the general law of extradition in all countries as to try an extradition prisoner for any other crimes than the extradition crime of which he had been accused in the country which delivered him up.

On the 9th of December, Sir E. Thornton informed Mr. Fish that, as the question had been raised in Lawrence's case, it might be difficult for the British government to surrender criminals hereafter, unless Her Majesty's government was assured by that of the United States, that the surrendered criminal should be tried only for the crime on which his surrender was demanded, and it cannot, therefore, in fairness, be alleged that Her Majesty's government deferred raising the question until there were three important cases of extradition pending. With reference to the allusions which you make to the case of Bouvier, it is to be observed that the point decided in that case was that, under the provisions of the French treaty, (identical so far as the point is concerned with the United States treaty,) unless it had been proved to the court that the French law had provided that Bouvier could not be tried for any other offense than that for which he was surrendered. Bouvier could not have been delivered up under the extradition treaty with France, which contained no such stipulation.

The attention of Her Majesty's government has been called to the letter addressed by the Attorney-General of the United States to the district United States attorney for the southern district of New York on the 22d December, 1875.

That letter is as follows:

"SIR: Application is again made to me in the Lawrence case, with a long record and an opinion of Judge Benedict.

"I now repeat what I have heretofore written with carefulness and urgency, and what I carefully tried to impress upon you when I saw you here, that, for grave political reasons, Lawrence must first be tried upon the charge upon which he was extradited, and upon no other, until that trial is ended, and whether subsequent proceedings for other crimes shall or shall not be taken, must await the order of the President.

"Now, upon an examination of the papers, it is perfectly easy for you and the court to determine upon what charge Lawrence was extradited, and to proceed to try upon that charge, and that only.

"This is a matter of great importance, and you must not blunder in it. There are consequences involved in it of a serious nature, as I have already told you, and we want to proceed in strict conformity with international law and international courtesy; therefore I merely add, try him first upon the charge for which he was extradited, and for that only.

"This instruction is so specific and so definite that it does not seem possible that an honest mistake can be made in this case.

"EDWARDS PIERREPONT,
"Attorney-General."

The question then arises whether the United States Government has, through the Attorney-General, power to stay proceedings in a prosecution which, in his opinion, is contrary to international law and international courtesy.

It appears from the last passage of the judgment of Judge Benedict, delivered on the 27th of March last, that the Government has such power by reason of its legal control over the prosecuting officer.

In the course of the same judgment the judge draws attention to the "political" aspect of the case, as distinguished from the judicial, and this distinction is material to

be kept in view, when cases are cited to show that courts have taken a course in one or two cases, without showing that such course was ever brought to the knowledge of the governments concerned.

This distinction was aptly illustrated in the late case of Blair, who was inveigled by a British subject, with the assistance of American officers, from the United States, and tried at Liverpool for fraudulent bankruptcy, and sentenced to eighteen months imprisonment.

Mr. Justice Miller, before whom this man was tried, took the same view as Judge Benedict, that it was not for the court before whom a prisoner was brought to inquire how he came before it. But, as soon as the facts were brought to the knowledge of the Government, and an inquiry had been made, although it was not clear whether the trick by which J. H. Blair was removed from the jurisdiction of the United States was the act of the British subject or of the American officers, the British government at once released Blair and sent him back to America, paying his expenses to the place from which he had been brought.

In a letter from the United States Attorney-General, he states: "We want to proceed in strict conformity with international law and international courtesy."

What, then, is the international law on the subject?

Her Majesty's government maintain that there is no country in the world which claims the right now put forward by the United States Government.

It will be found that France, which has the largest experience in extradition law and practice, and the largest number of extradition treaties with other countries, has never claimed such a right, whether there was any stipulation in the treaty to that effect or not; and that no country can be pointed out which puts forward such a claim.

Her Majesty's government must, therefore, adhere to the decision which they have maintained from the very first moment that they were assured of the intention of the United States Government to try Lawrence for other than the extradition crime for which he was surrendered. They have always regarded the claim so to try him as a breach of the treaty of 1842, and they have nothing to add to the opinion expressed in my notes to General Schenck and yourself of the 29th of February and the 11th ultimo.

Her Majesty's government deeply regret that there are two other cases which must follow their decision in regard to the case of Winslow; but they can only interpret Mr. Fish's views as conveyed in your note of the 20th ultimo as a distinct assertion of the right of the United States Government to try Lawrence for any offense whatever, and as a distinct refusal to come to any arrangement that Winslow and the other extradition prisoners now in custody here shall not be treated in a similar manner.

Her Majesty's government must act as the law of England and the practice of all other countries require them to act, and can only express their deep regret that the operation of a treaty, which, limited as it was, has worked for the mutual benefit of both countries, should be in danger of being so unnecessarily terminated.

They will not abandon the hope that the United States Government may yet consent to give such assurances as will enable the two governments to maintain it unimpaired.

I have, &c.,

DERBY.

Mr. Hoffman to Mr. Fish.

No. 82.] LEGATION OF THE UNITED STATES,
London, May 11, 1876.

SIR: I have the honor to inclose to you copies of two notes I have received from Lord Derby upon the subject of the extradition of Winslow.

I have, &c.,

WICKHAM HOFFMAN.

[Inclosure 1 with No. 82.]

Earl Derby to Mr. Hoffman.

FOREIGN OFFICE, *May* 5, 1876.

SIR: The note which I had the honor to address to you under yesterday's date contained the answer of Her Majesty's government to the letter which, by direction of

your Government, you addressed to me on the 20th instant. Since my note was prepared I have received from you a copy of the dispatch from Mr. Fish, dated the 31st of March, on which your letter was founded.

This dispatch has been communicated to Her Majesty's secretary of state for the home department, who has requested me to call your attention to the passage in Mr. Fish's dispatch in which, alluding to Lawrence's case, he says that "although not arraigned on any other indictment than for the forgery for which he was extradited, the British home office has raised the question that he may be possibly tried upon other charges and for other crimes."

The home secretary wishes to observe upon this, that no question was raised by him until he was satisfied that Lawrence had been indicted, although not yet arraigned for the offense of smuggling, and that Mr. Fish had signified to Sir E. Thornton that the United States Government claimed the right to try him for other offenses than that for which he was surrendered.

Information to this effect was received from Her Majesty's minister at Washington, on the 28th of November.

I have, &c.,

DERBY.

COLONEL HOFFMAN, *&c.*

[Inclosure 2 with No. 82.]

Earl Derby to Mr. Hoffman.

FOREIGN OFFICE, *May* 6, 1876.

SIR: I referred to Her Majesty's secretary of state for the home department your note of the 3d instant, in which you called attention to some recent cases of extradition from Canada, and I have the honor to state to you that I have been informed, in reply, that the home secretary has nothing to add to his former opinion upon the case of Winslow, except that he differs from the opinion of the Canadian judges, in the cases referred to, and that he would wish your attention to be called to a different decision in the case of the Lennie mutineers heard yesterday, at the Old Bailey, where Mr. Justice Brett held that a prisoner delivered up under the French extradition treaty for murder could not be put on his trial for being an accessory after the fact.

I beg leave also to refer you to the views already expressed in my note of the 4th instant, as to the distinction to be drawn in these cases between that which is within the province of courts and that which belongs more properly to governments to decide.

I have, &c.,

DERBY.

Colonel HOFFMAN, *&c.*

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *May* 12, 1876.

FISH, *Secretary, Washington:*

Am notified Government will oppose discharge of Winslow to-morrow on ground you have not received note of 4th May, and with hope that arrangement may yet be come to.

HOFFMAN.

Mr. Hoffman to Mr. Fish.

No. 84.] LEGATION OF THE UNITED STATES,
London, May 13, 1876. (Received May 24.)

SIR: Referring to previous correspondence upon the subject of Winslow, I have the honor to forward to you copies of two notes I have received from Lord Derby upon this subject.

I have, &c.,

WICKHAM HOFFMAN.

[Inclosure No. 1 in No. 84.]

Earl Derby to Mr. Hoffman.

FOREIGN OFFICE, *May* 10, 1876.

SIR: I have the honor to acknowledge the receipt of your note of the 8th instant, stating that Mr. Fish requests that your note of the 20th instant may be considered as withdrawn, and that his dispatch of the 31st of March, which was forwarded to me in a note from you dated the 29th (not 27th) ultimo, may be substituted for it.

I have, &c.,

DERBY.

[Enclosure No. 2 in No. 84.]

Earl Derby to Mr. Hoffman.

FOREIGN OFFICE, *May* 11, 1876.

SIR: With reference to my letter of the 3d instant, acquainting you that Winslow's case had been remanded for ten days, on the application of the attorney-general, I have the honor to state to you that I have been informed by Her Majesty's secretary of state for the home department that the attorney-general will be instructed to ask for a further postponement of Winslow's release when the next application is made to the judge, on the expiration of the postponement granted when the former application was made.

Her Majesty's government are most anxious that nothing should be wanting on their part to keep alive the possibility of coming to an arrangement with the United States Government on the extradition question now pending between them; and the ground on which the judge will be asked for a further postponement will be that there has not yet been time for Mr. Fish to have received the answer to his despatch of the 31st March, which was sent to you on the 4th instant.

The home secretary is, of course, unable to say whether the judge will accede to this application; but, in notifying that it will be made, he has expressed his extreme regret that there should be any risk of a cessation of the satisfactory working of the extradition treaty of 1842, which has been of such great mutual benefit to both countries.

I have, &c.,

DERBY.

Colonel HOFFMAN,
&c., &c., &c.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *May* 20, 1876.

FISH, *Secretary, Washington:*

Lord Derby suggests I should remind you, as matters stand, Winslow will be released Tuesday; asks if you have any communication to make. Says they would be happy to consider it.

HOFFMAN.

Mr. Fish to Mr. Hoffman.

[Telegram.]

WASHINGTON, *May* 20, 1876.

HOFFMAN,
Chargé, London:

Lord Derby's note not received until 17th instant. Public journals report the attorney-general as having said, on 13th, on asking Winslow to be remanded for ten days, that unless reply were received within

that time, no further detention would be asked. Lord Derby's note cannot be replied to by telegraph; no other mode of transmission could put it in London by the 23d.

If the British government is determined to refuse to surrender the fugitive, except on receiving the stipulation demanded, it is right to say to Lord Derby that it is impossible to give the stipulation. The President has not the power, if he were disposed to do so, as will be explained in a reply to his note, now being prepared, and which will be forwarded at an early day.

You will read this to Lord Derby.

FISH,
Secretary.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *May* 22, 1876.

FISH, *Secretary, Washington:*

Read telegram to Lord Derby. Will see what can be done to secure another remand. Talked case over.

* * * * * * *

London Times reviews your dispatch in leader. Approves it, praises it, and says Winslow should be surrendered.

HOFFMAN.

No. 887.

Mr. Fish to Mr. Hoffman.

DEPARTMENT OF STATE,
Washington, May 22, 1876.

WICKHAM HOFFMAN, Esq., &c.:

SIR: Your No. 79, under date of May 6, inclosing a copy of a note addressed to you by Lord Derby, in relation to the extradition of Winslow, bearing date May 4, reached me late on the 17th instant.

This note of Lord Derby's on its face is a reply to a note from you to him, wherein you communicated the general purport of an instruction addressed by me to you, under date of the 31st of March last; but on the 29th of April last you had given to Lord Derby a copy of the instruction of 31st of March. His lordship's note of the 4th of May is therefore taken as a reply to that instruction, although it contains allusion to some expressions in your note which were not there in pursuance of your instructions.

If Her Majesty's government had simply persisted in a refusal to deliver Winslow and the other criminals now in custody awaiting extradition, for the reasons heretofore given, it would have been unnecessary to prolong discussion, inasmuch as the distinct and definite refusal of this Government to give any assurance or stipulation not called for by the treaty, or to admit the right of Great Britain to exact from the United States stipulations foreign to the treaty, as a condition of the performance by Great Britain of her obligations, had already been communicated to Lord Derby.

But as the note in question assumes to give the grounds on which the

refusal to surrender the criminals is based, and in large measure seems to change those previously assumed, and as the United States cannot assent to the accuracy of many of the statements made, or to the inferences drawn therefrom, it seems necessary that some reply should be made.

In my instruction of the 31st of March last, reference was made in detail to numerous cases decided in the courts, and to evidence from various sources, alike British and American, including the testimony of British officials best versed in extradition law, the opinions of British Crown lawyers, the published decisions of British courts and British writers upon extradition law, that where a criminal was in good faith demanded for one offense within the treaty, and surrendered therefor, there was no agreement, understanding, nor practice that he might not be placed on trial for another offense with which he was charged, in addition to the extradition crime.

Lord Derby does not explain, modify, or deny that this whole current of authority is to this effect, but meets the point with the assertion that "there is no case within the knowledge of this [the British] government in which a prisoner was surrendered by England for one offense, and tried by the United States for a different one," and states that the case of Heilbronn was a "private prosecution," and that no evidence can be found of the attention of the government having been called to it. In a subsequent passage he again speaks of "private prosecutions," to which the attention of the government has not been called. I am at a loss to appreciate the application of the term "private" to the prosecution of a felony in the name and behalf of the state or sovereign. If, however it means no more than what is claimed when it is said that the attention of the government had not been called to a particular case, the question arises as to that jealous protection of individual and personal rights which is the just pride of British as it is of United States laws, and which constitutes so large a part of Lord Derby's note. The alleged criminal in whose behalf the state has exercised its sovereign power, whom it has seized and brought from a distant land under solemn treaty obligations, is especially entitled to be looked after by the state, and be protected in such rights as belong even to the criminal.

If Lord Derby's theory, that the prohibition of the trial of a surrendered fugitive, for other than the specific crime for which he had been delivered, be correct, either as a recognized principle of the general or international law of extradition, (if there be any such agreement between nations on the subject of extradition as to form what can be regarded as "international law,") or as implied in the treaty of 1842, then a surrendered fugitive is, under such international law, (if such it be,) or under such treaty, placed in the hands of the receiving government with the highest obligations of honor, of justice, and of international faith to protect that fugitive from any other prosecution than such as that government claims that he is liable to.

The fugitive is surrendered to the government in its political capacity, and if he be subjected to any prosecution against which he has a right to immunity, the government, into whose especial charge and guardianship he has been surrendered for a specific purpose, violates its faith and neglects its duty, both to the individual surrendered and to the state which surrendered him. On the theory advanced by his lordship, the surrendered fugitive must look to the state in its political character —what Lord Derby calls "the government"—for his protection; and that power, call it state or government, cannot escape its responsibility by the plea of ignorance, and that its attention had not been called to the case?

Heilbronn was a fugitive criminal demanded by Great Britain under the treaty of 1842, on the charge of forgery, and was accordingly delivered up by the United States to British justice. He was tried for forgery before a British court and acquitted, and was thereupon indicted and tried for a public offense not named in the request or warrant of extradition, and one not included in the treaty, and he was thereof convicted.

If, under British jurisprudence, no public prosecutor is provided to enforce her law against criminals surrendered on a demand made upon a foreign state, and the duties of a prosecutor are discharged by an individual not technically a servant of the Crown, but permitted to assume that office, can the government of Great Britain claim or expect that the regular proceedings in her courts can be disavowed by the political branch of the government as not having been brought to its attention, or that such proceedings form no element in determining what has been the practice of the two governments under the treaty?

Heilbronn's case was not referred to as an exceptional one, but as one of the numerous instances all tending to prove the unbroken practice and understanding of the two governments.

In addition to Heilbronn's and the other cases heretofore referred to by me, there are other and recent decisions of distinguished British judges directly upon the point, and in full harmony with the views maintained by the United States.

Mr. Justice Ramsay, in the case of Israel Rosenbaum, in the supreme court of Canada, in 1874, when the discharge of the prisoner was claimed because there was no prohibition under the laws of the United States against the trial of criminals for offenses other than those for which they were extradited, as was required by the act of 1870, says:

"If it were recognized as a principle of international law that a prisoner extradited could only be tried for the crime for which the extradition took place, it would not have been necessary for the Imperial Parliament to make these provisions," (alluding to the provisions of the act of 1870,) and adds, "I am not, however, aware that it has been laid down in England, that a man once within the jurisdiction of English courts could set up the form of his arrest, or the mode by which he came into custody, as a reason for his discharge when accused of crime," and the same was substantially held in the case of Worms, extradited from Canada within the last few weeks.

It is not the province of any government to make inquiry into the extent of knowledge which the political department of another government may have as to the practice or the administration of justice in its courts in reference to extradition, but I have alluded in prior instructions to the uniform practice, without dissent or objection, in both countries under the treaty of 1842, and have shown that it was common in both countries, and that it was held by high judicial decisions in both, that a prisoner, extradited in good faith for an extradition crime, might also be tried for another crime.

Lord Derby, in his note, again refers to the provisions of the act of Congress of August 12, 1848, as showing that persons delivered up could not be tried for any offenses other than those for which they were surrendered; although in my former instructions I stated that the United States district court, and the Solicitor-General, acting in the place of the Attorney-General, had each separately decided precisely the opposite. The construction of the municipal laws of a state pertain to that state, and not to other governments.

In the United States, a treaty, duly ratified and exchanged, is the supreme law of the land, and its provisions are binding without legisla-

tion. It becomes convenient, however, from time to time, to enact laws to regulate the general course of proceedings arising under one or a variety of treaties; but such legislation is purely internal and municipal.

The act of 1848 recognizes the fundamental doctrine that the surrender of a fugitive criminal is a political act of the Government, and the function of the court or magistrate is only to determine whether a case has been made out in accordance with the treaty, or the statute enacted in aid of its enforcement. It neither adds to nor detracts from the obligations created by the treaty, and is not essential to the execution by the United States of its engagements under the various extradition treaties into which this Government has entered, but affords a convenient and satisfactory aid in the administration of those obligations.

When the United States, by the twenty-seventh section of the treaty of 1794, in much the same language as the present treaty, engaged to deliver up fugitives, no act whatever was passed, but fugitive criminals, nevertheless, were given up on the demand of Great Britain under that provision of the treaty.

In like manner when the tenth article of the treaty of 1842 went into effect, no statute was needed, but six years thereafer (in 1848) the act in question was passed as being thought advisable to provide machinery to carry out all treaties providing for extradition, not only with Great Britain but with all governments with which the United States had and might have treaties, no matter what may be their particular provisions.

Of these treaties, some, as I have said, contain restrictions as to the crimes for which a criminal may be tried by the state demanding him, and others are silent on the question; but the act applies to all.

Lord Derby, in his note to you, contends that the British extradition act of 1870 imposed no new condition upon the treaty of 1842, but in his note of April 13 he refers to the condition "which Her Majesty's government are compelled to require under section 3, subsection 2, of the act of 1870."

When it is proposed to engraft, whether by implication or by act of Parliament, upon an existing treaty, a provision not expressly contained therein, I may be permitted to look into the debates in the British Parliament in 1866, when it was proposed to amend a bill to carry into effect the treaty with France, by requiring a stipulation similar in its purport to that now asked of the United States, and there find that his lordship, at the time Lord Stanley, and then, as now, Her Majesty's Secretary of State for Foreign Affairs, opposed the amendment, saying that "in a case like this, international courtesy demanded that the treaty should not be materially altered without communication with the other party."

In the same debate Lord Cairns, then attorney-general and now lord chancellor, said that the bargain was made between the sovereigns, and the amendment "proposed to introduce a new ingredient into the bargain which did not exist at the time the bargain was made. It might have been unreasonable that this new ingredient had not been introduced at the beginning, but to introduce it now was simply to break the bargain which the sovereigns had made and Parliament had ratified; it was to infringe upon treaty engagements, and that without notice to the other side." And further, and in particular reference to the latter part of the amendment, quite similar to the provisions of the act of 1870, now under discussion, he said, "to put such words into an act of

Parliament, which did not exist in the treaty, would only be offering a gratuitous insult to the foreign power to whom it applied without securing any real advantage." The amendment was withdrawn.

The treaty between Great Britain and France, which was the subject of that debate, was, like that between Great Britain and the United States of 1842, silent as to an inhibition of the prosecution of a surrendered fugitive for other than the specific offense for which he was given up. The proposition in Parliament thus sternly and honestly denounced and defeated as "discourteous," as "breaking a bargain," as "infringing upon treaty engagements," as "a gratuitous insult to a foreign power," and as "securing no real advantage," is, nevertheless, what it is now claimed has been done by virtue of the act of 1870 with regard to the United States.

Her Majesty's Court of Queen's Bench in Bouvier's case, and more recently the courts in Canada, have substantially held the same high doctrine which the eminent statesmen whom I have cited not long since announced in their places in Parliament. Neither international law nor international courtesy have changed the principles on which they were then recognized as resting.

The United States adheres to the position announced in my former instruction, that it will recognize no power to alter or attach conditions to the executory parts of an existing treaty, to which it is a party, without its previous assent.

Lord Derby seems to imagine some want of reconciliation between the views of the United States upon this extradition question and those asserted in its behalf on the rights of political asylum, and asks what is to prevent the United States from obtaining a prisoner on one charge and trying him for a political offense. The answer is ready:

The inherent, inborn love of freedom, both of thought and of action, engraved in the hearts of the people of this country so deeply that no law can reach and no administration would dare to violate.

A large proportion of those who sought refuge on our shores prior to the formation of this Government, sought this country for the enjoyment of freedom of opinion on political and religious subjects, and their descendants have not forgotten the value of an asylum nor the obligation of a state to shelter and protect political refugees. Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offenses, or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation.

That a sentiment stronger than written law has been sufficient to prevent any attempt to infringe on this right, it is but necessary to recall the political events occurring in England, in Ireland, and in the United States since the treaty of 1842 has been in force, the attempted and actual rebellions which have been witnessed, and the consequent exodus of parties engaged, and yet not a demand by either government upon the other for the surrender of a fugitive for a political offense. In this respect, what has been, must continue to be.

Careful as this Government has been and will be to maintain the right of asylum for political and religious refugees, it is mindful of the duty to its own citizens and to society at large devolving upon a state

to visit punishment upon offenders against the laws—a duty in no way antagonistic to the preservation of the right of asylum.

The rights of society and the duties of the state in the punishment of criminals should not be narrowed and unduly restricted upon the vague suggestion or fear that at some time some political criminal may be placed in jeopardy.

The duty of Government to protect its own citizens and punish crime is equally a duty with that of affording hospitality and shelter to political offenders from abroad.

The Government of the United States sees no reason why either should be sacrificed to the other, any more than why all criminals should escape for fear some political offender may suffer.

His lordship believes that the only test and safeguard for the liberty of the individual and the maintenance of the right of asylum are to be found in the principle for which he contends, that the crime or crimes of which a man is accused in the country surrendering, and for which he is surrendered, are the only crimes for which he ought to be tried in the country claiming.

Differing with his lordship, I think that the liberty of the individual and the right of asylum would be equally guarded (independently of any reliance on common principles and on the good faith of both nations) by a treaty providing that a surrendered criminal shall be tried for none other than one of the several crimes enumerated in the treaty, and for which each government is willing to surrender. The fugitive would thus be effectually protected against trial for a political offense, justice would be more effectually administered, and crime be allowed less chance of escape.

The United States would not object to such limitation in any treaty which it may be called upon to negotiate with a foreign state. But, with the limitation proposed by Lord Derby, it is possible that if a criminal be surrendered on a charge of murder, and if the evidence developed on the trial establish only manslaughter, he might consequently escape; or if one be charged with assault with intent to kill, and after the issuing of the requisition or of the warrant the victim dies, it is doubted whether in this case, under the common law of England, which obtains also in most of the United States, the fugitive could be convicted of assault, &c., and not having been surrendered for murder, the doctrine contended for would protect him from trial on such charge.

I should not here again advert particularly to the British act of 1870 but that Lord Derby's note seems to invite some examination of its provisions, and that he alludes to the abortive efforts made since its enactment to negotiate a new treaty of extradition between the United States and Great Britain, and (as he seems to claim) under its provisions.

In 1870, Great Britain had three treaties of extradition—with France, Denmark, and the United States.

Owing to difficulties presented by British law, the treaty with France had been, at least between 1843 and 1866, practically a dead letter; the treaty with Denmark has (as has been represented) rarely been resorted to, if at all.

The English practice as to extradition had been with the United States under the treaty of 1842. What that practice had been I have shown.

Great Britain at this time determined to establish a system of extradition, applicable to all governments, for her convenience, and in order to save the difficulty which had been experienced in obtaining the assent

of Parliament, or in providing the means of carrying out a treaty, and in substance proposed to define under what limitations and conditions extradition ought to be and might be had.

It was her right to propose a system and to invite foreign states to accede to her views and make treaties thereunder. The general system, however, was anomalous. It applied the same restrictions to a Christian or a non-Christian state, and left no opportunity to suit a particular treaty to the particular demands of two governments. Soon after the passage of the act of 1870, a proposition was made to the United States to make a treaty thereunder, and after some examination the proposition was declined.

In 1873, an amendatory act was passed, and further application being made, a negotiation was inaugurated.

Difficulties were experienced at the outset, and at every stage, growing out of the system which had been adopted and the inflexible character of the provisions of the act. Various draughts were from time to time prepared at the British foreign office, and discussed, with an effort to reach an agreement. In these draughts it was proposed that a criminal should not be tried for any offense committed prior to his surrender, other than the particular offense on account of which his surrender was made; and while an effort was made to extend the right to try a criminal to any of the extradition crimes named in the treaty, and to any higher crime than that for which he was surrendered, the effort was abandoned because the United States was informed that under the act a provision was inadmissible by which an offender surrendered for one offense named in the schedule could be tried for any other than the extradition crime. The nogotiation was continued, however, until June, 1874, when the United States reached the conclusion that a treaty could not be negotiated under the act.

That this Government ever reached or expressed the opinion that this act was the embodiment of what was the general opinion of all countries on the subject of extradition, is far from correct.

On the contrary, the United States was and is of the opinion that, as the provisions in a treaty placing limits on the right of a foreign state to try extradition criminals are chiefly inserted to protect political refugees, it amounts to a surrender of criminal justice to that principle to limit the right to a trial for the single particular crime named in the warrant of extradition, but that a proper limitation might be made by providing that the criminal shall be tried for no political offense, and for no crime not an extradition crime.

Such is understood to be the provision in almost all the French treaties negotiated with European powers; such was substantially the provision in the treaty negotiated between Great Britain and France in 1852, and such is the express provision inserted in the treaty negotiated between the British island of Malta and Italy in 1863, and approved in Great Britain.

From the earliest period this Government has had occasion to consider the questions arising under extradition law; the Articles of Confederation having extradition provisions, as has the Constitution of the United States, governing the question between the States of the Union; and while the United States do not profess to lay down rules of international law on this question, this Government does not consider it now for the first time, nor has its jurisprudence been silent in developing the system. In the negotiation referred to, the attention of the Government of the United States was directed to the proposed treaty

more than to the act, looking to its provisions as binding on the government of Great Britain, entirely irrespective of the act in question.

But many of the provisions of the act did not, and do not, seem to be reciprocal, and appear to furnish excuses for a failure to perform an obligation imposed by a treaty made thereunder, or a shelter for a responsibility which naturally belonged to the government.

In view of the position assumed by Great Britain during this controversy, by which treaty provisions are practically made subservient to acts of Parliament, the difficulty and want of reciprocity in making any treaty thereunder become more apparent.

It is not my intention to attempt to critically examine this British statute, but it will not be inappropriate to refer to some of these provisions.

Her Majesty's government reserves to itself the right by section 2, after an arrangement has been made with a foreign state, by the order in council applying the act, or by any *subsequent* order to "limit the operation of the order," to restrict the same, and to "render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient."

Again, section 2, subdivision one, provides that a fugitive criminal shall not be surrendered for a political offense, "or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the secretary of state, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." In substance, therefore, the criminal may take two appeals from the decision of a police magistrate on this question, and, provided he succeeds on any application, he may be discharged; but no provision is made for an examination of the question in any quarter, should the police magistrate decide in favor of the criminal. In such event a question, which is purely one for the government to deal with, is remitted to a police magistrate, and should he improperly decide, the government is sheltered by a quasi judicial decision, and this of an officer not necessarily of a high grade.

Again, section 2, subsection three, provides that a fugitive criminal shall not be surrendered unless provision is made by law in the foreign state, or by arrangement, that he shall not, until he has had an opportunity of returning, &c., be tried "for any offense committed prior to his surrender, other than the extradition crime, proved by the facts on which the surrender is grounded."

It will be seen the word "crime" is carefully used, in the singular, and, as Lord Derby states in his note, this Government was informed in 1870 that any provision would be inadmissible by which a prisoner surrendered for one offense could be tried for any "other than the extradition crime for which he was surrendered."

But when the corresponding provision limiting Great Britain to trials is examined, (section 19,) it is provided that a criminal so surrendered "shall not be triable, or tried, for any offense committed prior to the surrender in any part of Her Majesty's dominions, other *than such of the said crimes as may be* proved by the facts on which the surrender is grounded."

The want of reciprocity of these provisions is quite clear, inviting frequent questions and difference.

To make one further remark as to this act, the latter part of section 7 provides that if the secretary of state is of opinion that an offense is one of a political character, he may refuse an order for a warrant of

apprehension, and that he may "at any time order a fugitive criminal, accused or convicted of such offense, to be discharged from custody."

In the draughts of treaties prepared and submitted to this Government, under this act, no such corresponding authority to discharge criminals in custody was proposed to be given to the United States, nor does the act seem to contemplate a reciprocal right to other powers.

I repeat that this act does not concern the United States, except in so far as it is put forward to limit our treaty rights, and I have been drawn into any consideration of its system, or particular provisions, only from the language of Lord Derby, that it was the embodiment of the general opinion of all countries on the subject of extradition.

Moreover, if the United States had been willing to negotiate a new treaty, which should contain certain restrictions as to trials not included in the existing treaty, and give certain advantages not known thereto, such readiness could not justify Great Britain, after the negotiation had failed, in withholding all the advantages and in seeking to ingraft upon the old treaty such of the rejected provisions as she might select; particularly so when the act of Parliament of 1843 (6 and 7 Vict., ch. 57) was by its provisions to continue as long as the treaty; and the twenty-seventh section of the act of 1870 exempted the treaty with the United States from the clauses which were foreign to its terms; and when the United States, soon after the passage of the act of 1870, and on January 27, 1871, had informed Her Majesty's government that this Government understood the twenty-seventh section of the act of 1870 as giving continued effect to the existing engagements for the surrender of criminals, to which no dissent was at any time or in any form or manner expressed. In fact, the understanding of the United States on this question was not only not dissented from, but has been sustained by the supreme court of Canada in Worms's case in 1876, and in Rosenbaum's case in 1874, where the court states: "I cannot see how a new provision of the act of 1870 could be consistent with the treaties with France, the United States, and Denmark;" and by the conclusion, so far as a conclusion was reached, by the court of Queen's Bench in the case of Bouvier, in 1872, to which I have heretofore referred, where the lord chief-justice says that, although he hesitates to express an opinion, he plainly sees that it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force, and that, had it been necessary to decide that point, he would have been prepared to do so.

Having examined that case with care, as to what was there decided, I read with surprise Lord Derby's statement that the point decided was that, under the provisions of the French treaty, unless it had been proved to the court that the French law had provided that Bouvier could not be tried for any other offense than that for which he was surrendered, Bouvier could not have been delivered up; and I am quite satisfied that a perusal of the case itself will tend to a very different conclusion.

Lord Derby makes reference to certain correspondence between an official of the home office and the solicitors of Lawrence soon after his surrender, and before any representation had been made to this Government. This correspondence assumed in a few words to prejudge and dispose of the whole question, and to state what was the law of this country, and the general law of extradition of all countries, in reference to the trial of surrendered fugitives. It was unknown to and unauthorized by this Government, and founded on the representation and the argument of the criminal. It appeared in the public prints, and

was used by the counsel and friends of Lawrence in the United States to prejudge the question and create difficulty between the two governments; and I deeply regret the necessity which requires me to question the reference to *ex-parte* representations made by the paid solicitors of a criminal to an official of a foreign power, in the discussion of a grave question involving the rights and impugning the conduct of a friendly state, and jeoparding the maintenance of a treaty of long standing and of beneficial operation.

Lord Derby also quotes a letter of instruction addressed by the Attorney-General of the United States to the district attorney at New York in reference to the trial of Lawrence, whose case in the whole correspondence seems to have overshadowed that of Winslow, which alone is the subject of the present requisition made by the United States upon Her Majesty's government, and his lordship inquires as to the power of the Attorney-General over prosecutions instituted against extradited criminals.

The letter in question was addressed by the head of the Department of Justice to one of his subordinate officers, in reference to the conduct of a case under his charge. The Attorney-General directs that "Lawrence must first be tried upon the charge upon which he was extradited, and upon no other, until that trial is ended." This letter of instruction, passing from a superior to a subordinate officer, was not, and was not intended to be, an exposition of the views of the Government upon any general proposition, but a specific instruction in a particular case; and whether or not he had ever examined the opinion of the late distinguished under-secretary of state for foreign affairs of Her Majesty's government, he seems to have been guided by the same appreciation of treaty rights and of international law which led Lord Hammond, in his examination before the special committee of the House of Commons, to say, "We admit in this country that if a man is *bona fide* tried for an offense for which he was given up, there is nothing to prevent his being subsequently tried for another offense, either antecedently committed or not."

In reply to the question of Lord Derby as to the power of the Attorney-General over prosecutions, it will be borne in mind that in the United States an offense may be against Federal laws, or against the laws of one of the States. The Attorney-General has power to control all criminal prosecution for offenses against the Government pending in the Federal courts, but no power whatever to interfere, directly or indirectly, in any State prosecution. The President has, in like manner, power to pardon criminals convicted, and to direct the suspension or dismissal of criminal prosecutions in the Federal courts, but none to pardon those tried and convicted in the State courts, or to control the proceedings of these courts.

Criminals of both classes come under the extradition treaty. It happens that Lawrence is charged with crimes against the Government, and Winslow and the other forgers with crimes against State laws.

Neither the President, nor any officer of the Federal Government, has power to control or to dismiss the prosecution in Winslow's case, or in any case where the offense is against the laws of one of the States, and could not give any stipulation or make any arrangement whatever as to the offenses for which he should be tried when returned to the justice of the State against whose laws he may have offended.

But, as I have before stated, a treaty, duly ratified and proclaimed, is in the United States the supreme law of the land, and if the extradition treaty did, as it does not, provide that no criminal could be tried

for any other than certain particular offenses, such a provision would be binding upon all courts, both State and Federal.

The absence of any such provision from the treaty between the United tates and Great Britain leaves to the State courts the extent of jurisdiction over returned criminals, which has been so repeatedly referred to as recognized by the judicial decisions of the courts of both countries.

His lordship refers to the "late case of Blair, who was" (as his lordship mildly expresses it) "inveigled by a British subject, with the assistance of American officers from the United States, and tried at Liverpool for fraudulent bankruptcy, and sentenced to imprisonment." He was promptly released by the British government, which sent him back to the United States, paying his expenses back to the place whence he had been brought. This prompt and generously just conduct of Her Majesty's government is duly recognized and appreciated by the United States.

The abduction was, however, regarded by this Government as a case of kidnapping; but the power so promptly and efficiently exercised by the British government is an evidence of the inherent power existing in the political department of that government, when it sees fit to exercise it, over the person of the individual, and in control even of the judgments of the courts. Could not the power thus summarily exercised in an act of comity, and in consideration of a wrong committed in a distant jurisdiction, be also exercised in the performance of a treaty obligation, and in aid of the administration of justice, without being hampered by the technicalities of a municipal act? Whether Blair personally desired to be returned to the United States is not known, nor is it supposed to be of any consequence. He was deported and sent out of Her Majesty's jurisdiction by the political authorities of the government without process of law, but merely upon the representation of the United States of the circumstances attending his abduction or inveiglement.

His lordship speaks of having been "assured of the intention of the United States Government to try Lawrence for other than the extradition crime for which he was surrendered." Her Majesty's government has never been thus assured, and for the very good reason that the Government of the United States has never reached any such conclusion, and has neither expressed nor formed any such intention. It does, however, hold to the opinion that, if thus inclined, it has the power and the right, after having tried him on the charge on which he was surrendered, (although he may have been surrendered on only one of twelve or more charges of which the proofs were furnished,) with a *bona-fide* intent and effort to convict him on that one charge, to try him for others of the many offenses of which he has been guilty. It does not conceal, but avows, its belief in this right. And hereupon Lord Derby advances the startling declaration, which I repeat in his own words: "They" (Her Majesty's government) "have always regarded the claim so to try him as a breach of the treaty of 1842."

If Her Majesty's government seriously advances this as indicating a mode whereby, in their judgment, a treaty may be broken, it is as novel as it may prove to be far-reaching. It is simply the proposition that the assertion by one party to a treaty of a claim, or of a construction of the instrument not admitted by the other, and without any act in derogation of the convention or of the rights of the other party, constitutes of itself a breach of the treaty.

I note this assertion, not with a view to discussion, but in the hope that so dangerous a doctrine may prove to have been unguardedly ad-

vanced, and may not be left unexplained or unavowed to justify future action (from whatever quarter) upon its broad statement, under which treaties and conventions become worthless.

While it may not be necessary to repeat the position of the United States, it is proper to say that the United States has simply demanded the performance by Great Britain of her treaty obligation to deliver fugitives under the treaty of 1842, as the same has been in operation for more than thirty years, and insists that no British statute can attach a condition to the treaty foreign to its terms.

If any proceedings in the United States, in the case of any criminal, have given rise to question or complaint, this Government is prepared to hear and properly dispose of any such complaint.

But while the treaty shall be in force, the Government of the United States would be strangely forgetful of the dignity and rights of the country if a foreign state were permitted to exact stipulations or engagements pursuant to her law, but foreign to the treaty, as a condition of obtaining the performance of treaty obligations.

It will be a cause of great regret that a treaty which has worked so long and so beneficially should be terminated on such a ground; but the decision of this question is for the authorities of Great Britian. The United States has in due form, and after complying with every requirement of the treaty, demanded the surrender of Winslow and the other criminals in London, and it is for Her Majesty's government to decide whether Great Britain will or will not perform her treaty obligations.

You will read this instruction to Lord Derby, and in case he desires it, you will furnish him with a copy.

I am, sir, your obedient servant,

HAMILTON FISH.

Mr. Fish to Mr. Hoffman.

No. 890.] DEPARTMENT OF STATE,
Washington, May 24, 1876.

SIR: Since instruction No. 887, dated the 22d instant, was prepared, I have received your No. 82, under date of the 11th instant, inclosing copies of two notes addressed to you by Lord Derby on the subject of the extradition of Winslow, bearing date, respectively, the 5th and 6th instant.

In the former of these notes Lord Derby informs you that a copy of instruction of March 31, which had been transmitted to him by you on April 29, had been communicated to Her Majesty's secretary of state for the home department, who had requested him to call your attention to the part which alludes to Lawrence's case, and which states that,although not arraigned on any other indictment than for the forgery for which he was extradited, the British home office has raised the question that he may be possibly tried for other charges and for other crimes, and states that the home secretary wishes to observe that no question was raised by him until he was satisfied that Lawrence had been indicted, although not yet arraigned for smuggling.

An indictment was found against Lawrence for smuggling, February 3, 1875, a month before any steps had been taken toward his extradition or any demand made therefor.

The indictment had been found some time before he departed for Great Britain; his extradition was not asked therefor, nor was the

charge proved against him in the proceedings in London, and he has not been arraigned upon it in this country.

The United States has stated what is claimed to be the practice and the right of this Government under the extradition treaty, but has not stated its intentions as to the trial of Lawrence, nor has Her Majesty's government, so far as I am aware, any evidence to justify any conclusion on that point.

Lord Derby, in his subsequent note of the 6th of May, informs you, in reply to your note transmitting references to certain late decisions in the supreme court of Canada, not in harmony with the position assumed in the case of Winslow, that the home secretary has informed him that he differs from the Canadian judges, and calls attention to the case of the Lennie mutineers, heard on May 5, in London.

This case, as I apprehend, would be governed by the French treaty made under the law of 1870, and by that act, and, if so, would be in no way applicable to the present discussion.

You will furnish Lord Derby with a copy of this instruction.

I am, &c.,

HAMILTON FISH.

Mr. Hoffman to Mr. Fish.

No. 95] LEGATION OF THE UNITED STATES,
London, May 25, 1876.

SIR: I have the honor to forward to you herewith a copy of the only note of importance I have lately received from Lord Derby in the Winslow matter. I add a copy of my reply.

I have the honor to be, with great respect, your obedient servant,

WICKHAM HOFFMAN.

Lord Derby to Colonel Hoffman.

[Inclosure No. 1 with No. 95.]

Immediate.] FOREIGN OFFICE, *May* 19, 1876.

SIR: With reference to my note of the 13th instant, I have the honor to remind you that the hearing of the application for the release of Winslow from custody was postponed for ten days from the 13th instant, and that as matters stand at present, he will be released on Tuesday, the 23d instant.

Her Majesty's government would be happy to consider any communication which Mr. Fish might instruct you to make on the subject, after having received my letter to you, of the 4th instant; and if no such instructions should have reached you, I would suggest that you should call the attention of your Government, by telegraph, to the date at which Winslow will be released, and should inquire if they have any further communication on the subject to make to Her Majesty's government.

I have the honor, &c.,

DERBY.

Mr. Hoffman to Earl of Derby.

[Inclosure 2 with No. 95.]

LEGATION OF THE UNITED STATES,
London, May 20, 1876.

MY LORD: I have the honor to acknowledge the receipt of your note of yesterday in reference to the case of Winslow, and to inform you that I have to-day telegraphed to Mr. Fish, in accordance with your suggestion.

I have the honor, &c.,

WICKHAM HOFFMAN.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *May* 26, 1876. (Received May 26, 1876.)

Lord Derby refers to your eight-sixty-four as regards treaties with certain foreign powers; also to article three of draught treaty lately discussed, to which article he says you gave your assent, and requests me to ask by telegraph if my Government, to meet present difficulty, will add this article to treaty of forty-two. In this case Sir Edward Thornton will be instructed to sign it at once.

HOFFMAN.

Mr. Fish to Mr. Hoffman.

[Telegram.]

WASHINGTON, *May* 27, 1876.

Your telegram received. Thornton has read to me one from Lord Derby, stating that you had proposed to him the negotiation of the additional article.

You will please inform me immediately whether the suggestion proceeded in the first instance from you or from him, and if from him, how far you may have encouraged it.

FISH, *Secretary.*

Memorandum of a conversation between Sir Edward Thornton and Mr. Fish, at the Department of State, Saturday, May 27, 1876.

Sir Edward Thornton read a telegram from Lord Derby, stating in substance that Mr. Hoffman, the United States *chargé* in London, had suggested to him that an additional article to the treaty of 1842 might be negotiated, and he (Lord Derby) thereupon proposed an article similar to the 3d article of the *projet* of a treaty which was under consideration between Sir Edward Thornton and Mr. Fish in June, 1873, which proposed to restrict the trial of a surrendered fugitive to that for the specific crime for which he may have been surrendered, and to which article he said Mr. Fish had proposed an amendment prescribing the time within which the fugitive might be at large after trial or discharge, before he could be arrested for trial on another offense, and during which he should be at liberty to return to the country by which he had been surrendered. That if this proposal be accepted by the United States, he (Lord Derby) would sign the new article in London with Mr. Hoffman, or Sir Edward Thornton would be authorized to sign it here with Mr. Fish.

Mr. Fish, in reply, expressed regret and surprise that Mr. Hoffman should have made any suggestion on the subject, and assured Sir Edward Thornton that Mr. Hoffman had no authority from his Government to make or to entertain any such proposition or suggestion, but that he was strictly limited to the conveyance of specific instructions from his Government so far as relates to any question affecting the construction of the extradition treaty between the two governments, and Mr. Fish requested Sir Edward Thornton to assure Lord Derby to this effect. Mr. Fish added that he endeavors to give Mr. Hoffman instruc-

tions on that particular question which should be read to Lord Derby, and not to leave anything for oral representation or oral discussion, in order to avoid the possibility of any misapprehension from telegrams or other cause.

With regard to the proposition for negotiating an additional article to the treaty of 1842, he remarked that although he might have been willing in the negotiation of 1873 to have inserted the article now proposed, in a treaty which gave to the United States the improvements which it desired in the treaty of 1842, of a larger list of extradition crimes and other advantages, it could not be expected that the United States would now accept the limitations and restrictions upon what it holds to be its rights under the treaty without obtaining any of the advantages for which such limitations might have been accepted.

That the United States is extremely anxious to reach a satisfactory settlement of the difficulties which have been interposed in the execution of the treaty, but that the proposed article would impose upon the United States the limitation which it denies to exist under the treaty, and would secure no one advantage which it desired, and no improvement upon the treaty of 1842.

And, further, that in view of the argument which has been advanced by the British government, of the controlling force of the act of Parliament over all treaties or arrangements for extradition made by Her Majesty's government subsequent to its enactment, it might be claimed, and possibly not without some force, that an article in amendment or additional to the treaty of 1842, would bring that treaty under the operation and control of the act, which this Government denies to be the case, and cannot consent to. It would be admitting away one of the grounds on which the United States stands.

He referred to what he considered defective features in the British act of 1870, which he thought made it unequal in its provisions as to the British and to the foreign governments, and as wanting in reciprocal powers and rights.

He further said that he thought it unwise to attempt to patch up the treaty of 1842; that the present would not be a propitious moment for such efforts; and that whenever anything is attempted in the way of altering that treaty, it would require a more general revision, and especially an enlargement of the list of extradition crimes.

Mr. Fish added that the United States would not object in any negotiation to be hereafter entered upon, that a treaty should provide to the effect that a surrendered criminal shall not be tried for any crime or crimes other than such as are of the class enumerated in the treaty as extradition crimes, nor be tried for any political offense.

In this connection he referred to the treaty negotiated in 1852 between Great Britain and France, (signed by Lord Malmesbury and Count Walewski,) which contained a provision to that general effect.

And upon Sir Edward Thornton observing that the act of 1870 would prevent the British government from agreeing to such a stipulation, Mr. Fish asked whether Her Majesty's government could not obtain from Parliament a special enabling or ratifying act for the particular treaty which might be negotiated between the two countries.

Mr. Fish further said that with such provision in a treaty, and with the similarity of feeling of the two governments and of their people on the question of political asylum, a full protection would be secured against the trial of a surrendered fugitive for any political offense; and that the violation of such provision by either of these two governments was not within the reach of contemplation, but, should it occur, it would

lead to the denunciation of the treaty by the surrendering state, which would also be at liberty to hold the offending state to its responsibilities for violating a treaty engagement; the treaty would be broken by an act in violation of its terms; whereas if the state on which the demand for surrender is made decide that such demand, being made (as it must be) for one of the extradition offenses, is really designed to bring the fugitive to trial for a political offense, and refuses surrender on that ground, it would be an imputation upon the good faith of the request, and upon the integrity of the demanding state, which would justly give rise to resentful feelings, and would equally lead to a denunciation of the treaty by the state whose requisition has been refused, and whose honor and integrity has been questioned, and in this case the treaty would fail, not for an act done, but for the questioning of the good faith of one of the parties.

HAMILTON FISH.
EDWARD THORNTON.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *May* 28, 1876.

In conversation with Tenterden about future negotiations for a new treaty and difficulties in the way, I suggested that if we could not agree upon all the terms of a new treaty, we might amend old treaty by adding to it the articles upon which we were agreed. Suggestion as regards Winslow proceeds entirely from British government.

Reported substance of conversation by mail Saturday.

HOFFMAN.

Mr. Fish to Mr. Hoffman.

[Telegram.]

WASHINGTON, *May* 28, 1876.

Your suggestion was unauthorized and is regretted and disapproved. You are to receive any representations or information on the subject of the treaty, or of pending difficulties, and report them here, but to abstain from discussion or suggestion unless under specific instruction. All negotiation on the extradition question will be conducted here.

Should Winslow be given up, you will perform the appropriate duties, but say nothing to compromit this Government, or to further embarrass the general question.

FISH, *Secretary.*

Mr. Hoffman to Mr. Fish.

No. 99.] LEGATION OF THE UNITED STATES,
London, May 27, 1876.

SIR: Referring to my telegram of last evening in the matter of Winslow, I have the honor to forward to you herewith a copy of the note of Lord Derby upon which it was based, and which I received late yesterday afternoon.

With regard to the "suggestion made by me in conversation," it is proper to state that, calling on Lord Tenterden, to ascertain what had taken place in connection with the last remand of Winslow, the conversation turned upon a new treaty and the difficulties in the way of negotiating it, when I observed "that if we should be unable to make a new treaty why should we not amend the old one upon the points upon which we are agreed. We have got along very well under it for thirty years, and with two or three amendments there is no reason why we should not get along under it for many years more."

I have the honor to be, with great respect, your obedient servant,

WICKHAM HOFFMAN.

[Inclosure 1 with No. 99.]

Lord Derby to Colonel Hoffman.

FOREIGN OFFICE, *May* 26, 1876.

SIR: With reference to the paragraph in Mr. Fish's dispatch of the 31st of March, in which he states that "in some few treaties between the United States and foreign countries provisions exist that the criminal shall not be tried for offenses committed prior to extradition other than the extradition crime," and to the draught article to the same effect contained in the draught treaty lately discussed between the two governments, to which article Mr. Fish had given his assent, I have the honor to request that you will state to your Government, by telegraph, that Her Majesty's government will be ready at once to meet the suggestion made by you in conversation at the foreign office yesterday, and to sign an additional article to the treaty of 1842, in the words of that draught article, of which a copy is inclosed.

I have to add that this article is identical with the one contained in all the extradition treaties between Great Britain and other countries, mentioned in the accompanying list.

On being informed that the Government of the United States consent to adopt this method of meeting the present difficulty, Her Majesty's government will be ready to authorize Her Majesty's minister at Washington, who has full powers, to sign the additional article with Mr. Fish, or I shall be happy to do so with you, if your Government prefer it.

Her Majesty's government trust that the Government of the United States will see in this proposal, a proof of their sincere desire to maintain a treaty of such importance to both countries.

I have the honor, &c., &c.,

DERBY.

Every extradition treaty concluded by Great Britain with foreign powers since the passing of the act of 1870, contains an article in accordance with section 3, subsection 2, of the act.

The following are the treaties in question:

Austria, 3d December, 1873; Belgium, 31st July, 1872; Brazil, 13th November, 1872; Denmark, 31st March, 1873; Italy, 5th February, 1873; Germany, 14th May, 1872; Netherlands, 19th June, 1874; Sweden and Norway, 26th June, 1873; Switzerland, 31st March, 1874; Hayti, 7th December, 1874; Honduras, 6th January, 1874.

Draught article in proposed extradition treaty with the United States, agreed to by Mr. Fish.

ARTICLE III.

When any person shall have been surrendered by either of the high contracting parties to the other, such person shall not, until he has been restored or had an opportunity of returning to the country from whence he was surrendered, be triable or tried for any offense committed in the other country prior to the surrender other than the particular offense on account of which he was surrendered.

No person shall be deemed to have had an opportunity of returning to the country whence he was surrendered until two months, at least, shall have elapsed after he shall have been set at liberty and free to return.

N. B.—The last paragraph of this article was added by Mr. Fish.

Mr. Fish to Mr. Hoffman.

No. 897.] DEPARTMENT OF STATE,
Washington, June 8, 1876.

SIR: I have to acknowledge the receipt of your dispatch No. 99, under date of the 27th May last. You state that, calling on Lord Tenterden to ascertain what had taken place in connection with the last remand of Winslow, the conversation turned upon a new treaty, and the difficulties in the way, when you observed "that if we should be unable to make a new treaty, why should we not amend the old one upon the points upon which we are agreed," and added that, with two or three amendments, there was no reason why we should not get along with the treaty for long years to come.

Thereupon, and on the following day, (May 26,) Lord Derby addressed you requesting you to state to this Government by telegraph, the readiness of Her Majesty's government to meet the suggestion made by you in conversation at the foreign office, and to sign an additional article to the treaty of 1842, in the form which was inclosed to you.

It appears, therefore, that in a formal visit to the foreign office you undertook, without instructions, and without attempting even to ascertain the wish of this Government in that direction, to propose to the under secretary of state the negotiation of a new article additional to the treaty of 1842, limiting that treaty in respect to the offenses for which a criminal should be tried to the requirements of the act of 1870, but securing to the United States none of the advantages which the proposed treaty in others of its articles might have given, and practically conceding the claim which Great Britain had made in the case of Winslow as a condition of his surrender.

* * * * * * *

While you did not appear to have considered the effect of your proposition, Her Majesty's ministers were prompt to see that you proposed to surrender the case and to place this Government, by treaty-concession, in the position which Her Majesty's government had endeavored to induce it to occupy by a stipulation, and were fully alive to the advantage of attaching the act of 1870 to the treaty of 1842, by an additional article, under your suggestion.

Sir Edward Thornton, on the morning of the 27th, read to me a telegram from Lord Derby, stating that you had suggested to him that an additional article to the treaty of 1842 might be negotiated, and thereupon proposing to negotiate the article in question, pursuant to your suggestion, and was informed that any suggestion or proposition made by you on the subject was without the knowledge of this Government, and that you had no authority from your Government to make or to entertain any such proposition or suggestion, and that your conduct in this respect was regretted and disapproved; and he was requested to inform Lord Derby to that effect. It was deemed advisable to make a memorandum of this interview, a copy of which is herewith inclosed.

My telegram to you of the 28th informed you of the impression produced by your action, and instructed you to abstain from any further act which might embarrass this negotiation.

* * * * * * *

I am, sir, your obedient servant,

HAMILTON FISH.

WICKHAM HOFFMAN, Esq., *&c., &c., &c.,*

NOTE.—See the memorandum referred to on page 44.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *June* 1, 1876.

FISH, *Washington:*

Notified by Lord Derby Winslow case finally adjourned until fifteenth instant.

HOFFMAN.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *June* 6, 1876. (Received June 6, 1876.)

Read 887. Left copy with Lord Derby to-day. Sent him copy of 890. Brent applies for *habeas corpus*. British Government will ask remand until 15.

HOFFMAN.

Mr. Hoffman to Mr. Fish.

[Telegram.]

LONDON, *June* 9, 1876.

Extradition correspondence, Lawrence, Winslow, Brent, Gray, published.

Latest dispatch, Derby to Thornton, May 29.

Yours, May 22, not published.

HOFFMAN.

APPENDIX.

COURT OF QUEEN'S BENCH,
November 21, 1872.

EX PARTE BOUVIER. (27 Law Times, 844.)

Habeas corpus.—Prisoner convicted in France. Surrender to authorities under extradition act, 1870, (33 & 34 Vict., c. 52.)

* * * * * * *

By sec. 27, 6 and 7 Vict., c. 75, among other acts is repealed, "and this act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply, (as regards crimes committed either before or after the passing of this act,) in the case of the foreign states with which those treaties are made, in the same manner as if an order in council referring to such treaties had been made, in pursuance of this act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act." Affidavits concerning the French law were produced by both sides.

COCKBURN, C. J.: I am of opinion that this rule should be discharged. I rather hesitate to express any decided opinion as to the construction to be put upon the 27th section, although I see plainly what was the intention of the legislature; that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force. This has been probably effected, but is certainly not very clearly expressed. Nothing would have been more simple than to enact that, although it was expedient to repeal the statutes, yet that the treaties should still have full force and effect; instead of which this complicated and obscure language has been adopted. If it were necessary in the present case to decide that point, I should have been prepared to do so, and to declare that the object had been accomplished, though at the same time I should be disposed to advise the government to make the matter safe by amending the act, in case any question might hereafter arise upon it. Upon the second ground, upon which we are asked to discharge the rule, I think there can be no real doubt. By section 3, subsection 2, the statute is to have full force where provision is made by the law of the state demanding the extradition of the criminal, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded. I consider that the requirements of this provision are satisfied. We are now clearly informed of the practical working of the French law by the affidavit of M. Moreau, referring to the circular which is binding upon the courts of that country. It expressly provides that the criminal who is surrendered in respect of one offense will not be tried for another until he has been restored or has had an opportunity of returning to Her Majesty's

dominions. This view of the French law is confirmed by M. Felix, M. Blondel, and other authors of the highest possible authority. I am satisfied that we must discharge the rule.

BLACKBURN, J.—I have no doubt that it was intended that the old treaties should still have force and effect, and that they should be enforced by the machinery provided under the extradition act 1870. It was not intended to abrogate the old treaties, but I have very serious doubts whether the legislature have effected, by the twenty-seventh section, what was intended. If it was necessary to decide that point, I should desire to take time to consider, but I content myself with saying that it seems desirable that there should be some further legislation upon the subject. But upon the other point I am of opinion that the requirements of section 2, subsection 3, are complied with. The French law does provide that the fugitive criminal shall not be tried for an offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded. When we read the affidavit of M. Moreau and the text-books, this is made clear. The criminal ought, therefore, to be surrendered.

MELLAR, J.—I am inclined to agree with the construction of section 27 suggested by the attorney-general; but I feel some doubt, and it would be advisable to set all doubt at rest by further legislation. Upon the other point I entirely agree with the judgments of my lord and my brother Blackburn.

SUPREME COURT OF CANADA, 1874.

Extradition case.

[Extract from report of judgment.]

IN RE, }
ISRAEL ROSENBAUM. }

RAMSAY, Jr.

On demand for extradition by the Government of the United States of America. Before proceeding to adjudicate on the merits of this application, I must dispose of a question raised while the evidence was being taken, the decision of which was reserved till after the final hearing.

The district attorney for the State of New York, being called as a witness by the prosecution, is asked on cross-examination on the part of the prisoner, "Is there any provision in the law of the United States, or in that of the State of New York, prohibiting the trial of the person extradited for any other crime than that for which he is so extradited?"

On the part of the Government of the United States, it is objected that this question is irrelevant; Mr. Kerr, for the prisoner, cites sec. 27 of the extradition act, passed in 1870, (33 and 34 Vict., cap. 52.)

The section in question reads as follows: "The act specifies in the third schedule to this act are hereby repealed as to the whole of Her Majesty's dominions, and this act, (with the exception of anything contained in it which is inconsistent with the treaties referred to in the acts so repealed,) shall apply, (as regards crimes committed either before or after the passing of this act,) in the case of the foreign states with which

those treaties are made, in the same manner as if an order in council referring to such treaties had been made in pursuance of this act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act."

This raises the whole question as to what law governs extraditions in Canada, and whether our statute respecting extraditions on the demand of the Government of the United States of America, is repealed, and if not, to what extent it is in force.

The first enactment of section 27 is perfectly simple. It repeals the act under the French treaty, both the acts under the treaty with the United States, the act of giving effect to the extradition convention with the King of Denmark, and act for the amendment of the law relating to treaties of extradition in 1866, (29 and 30 Vict., cap. 121.) The difficulty arises with regard to the construction of the second member of the section.

In order fully to understand the scope of the question raised, it is necessary to observe that by the form of expression used in the previous parts of the act, and notably in sections 2, 4, and 5, it would seem as though it were not intended to apply the act in any degree until the foreign countries with which treaties existed had, either by law or by arrangement with Her Majesty, recognized those principles.

If the statute had gone no further than this the effect of these enactments would have been to sweep away the whole of the imperial acts, giving effect to extradition with every foreign country. This could not have been contemplated, and the necessity of avoiding such a result gives us the key of the second part of section 27, which thus becomes clear.

The act of 1870, except in so far as it is inconsistent with the treaties referred to in the acts enumerated in the third schedule, that is, with the treaties with France, with the United States, and with Denmark, shall apply as if an order in council referring to such treaties had been made in pursuance of this act, and if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect "as part of this act."

The effect, then, of these treaties is saved, (1,) for all Her Majesty's dominions; (2,) colonial legislation is saved, but to what extent? Colonial legislation is to be read as part of the act of 1870, and the act of 1870 is only to apply in so far as it shall not be inconsistent with the treaties with France, with the United States, and with Denmark.

I may observe, *en passant*, that the act of 1870 seems to affect section 132 of the British North America act of 1867, by which the parliament and government of Canada is granted "all power necessary or proper for performing the obligations of Canada, of any province thereof, as a part of the British Empire, toward foreign countries, arising under treaties between the empire and such foreign countries." At least it has hitherto been supposed that this section gave the Canadian parliament power to legislate on treaty questions, and it was on this understanding our extradition act of 1869 was passed.

I may further observe that if there had been any order of the Queen or council suspending the operation of the act in Canada, as provided in section 18, all this difficulty would have been avoided, but I am informed officially that no such order exists. I must, therefore, at each step decide what part of our act is not inconsistent with so much of the act of 1870 as is consistent with the treaties mentioned in the third schedule, that is, the treaties with France, with the United States, and

with Denmark. This may become a very involved operation; but, as the question is now raised, I see no other mode of dealing with it. I am confirmed, too, in the view I take, by the case of Foster, so far as it goes. There it was urged at the last moment that our legislation was repealed by the imperial act of 1870, and this pretension was negatived by the unanimous judgment of the court, and, I may add, I think rightly. In the present case it only requires me to decide whether there is any necessity for the proof of the existence of a special law in the United States to the effect that a prisoner extradited for one offense cannot be tried for another unless he has had an opportunity of leaving the jurisdiction. Is this exaction of the act of 1870 inconsistent with the treaty with the United States? On the part of the prisoner, Mr. Kerr has urged with great ingenuity that the provisions of subsections 1 and 2 of section 3 are not inconsistent with the old treaties, and that they are, therefore, in force; and that, until there is an order in council under section 5 which will of itself settle the fact as to whether subsection 2 has been complied with, the existence of the foreign law or arrangement must be proved. He further says, in support of the proposition that subsection 2, section 3, is not inconsistent with the old treaties, that the trial of a prisoner remanded for any other crime than that mentioned in the demand is a violation of international law.

Notwithstanding the plausibility of this reasoning, it fails to convince me. In the first place, it goes too far; for if it were recognized as a principle of international law that a prisoner extradited could only be tried for the crime for which the extradition took place, it would not have been necessary for the Imperial Parliament to make these provisions, and it would not be necessary to ask this question. I am not, however, aware that it has been laid down in England that a man once within the jurisdiction of English courts could set up the form of his arrest, or the mode by which he came into custody, as a reason for his discharge when accused of a crime. But even were this otherwise, it is not the international law that it is sought to prove, but the special requirements of a new statute.

Now I cannot conceive how a new provision of the act of 1870 could be consistent with the treaties with France, the United States, and Denmark, entered into years before. Being of this opinion, I do not think the 1st and 2d subsections of section 3 can be considered in force until there is an order in council proclaiming them. I am officially informed that there is no such order.

A case of Bouvier, Law Journal Reports, vol. 42, part 2, new series, has been cited to establish that though there was no order in council proclaiming that the act of 1870 applied in its entirety to France, that still it was necessary to show by evidence that by the law of France the French government would not try the prisoner for any offense other than that for which the demand in extradition had been made. It seems to me that the case cited does not maintain the proposition. The judges in England did not decide the point raised here. They admit its difficulty and speak of the complicated and obscure language of section 27, and they discharged the rule on the ground that there was evidence that by the law of France the prisoner surrendered cannot be tried for any other offense, and consequently that it was not necessary for the court in that case to interpret section 27. Mellor, J., said, however, that he was inclined to agree with the argument of the attorney-general, which seems to me to express the same view of section 27 which I take. Mr. Kerr insisted strongly that the chief-justice, and Mr. Justice Blackburn would not have said that they considered the provision of

subsection 2, section 3, complied with, unless they thought it was in force. But by the context we see clearly that they do not decide whether it was in force or not, but, that if in force, it was complied with. Whether it was in force or not depends on the interpretation of section 27, on which they did not enter. The two points raised by the attorney-general are these: (1.) Subsection 2 is not in force. (2.) If it is its, provisions have been complied with. The court adjudicated on the last point only.

No more recent case in England has been brought under my notice, and there has not been any modification of section 27. Under the circumstances, I may be permitted say that the obscurity of the language of the statute appears to me to result from the complication of the system to be introduced, rather than from any defect of phraseology. Whether that complication is desirable or necessary, I am not called upon to determine. It is sufficient for me to interpret the statute as I find it, and about the question before me I have no doubt or difficulty.

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No. 345.

Mr. Dart to Mr. Cadwalader.

[Extract.]

CONSULATE-GENERAL OF THE UNITED STATES OF AMERICA
FOR THE BRITISH NORTH AMERICAN PROVINCES,
Montreal, April 7, 1876.

SIR: Referring to the negatiotions now pending between the United States and the government of Great Britain in reference to the extradition of Winslow, forger, late of Boston, I cannot resist the temptation to give to the Department of State, although it may be of no value, two precedents established by the judges of the Dominion of Canada under the Ashburton treaty. The first arose at the October term of the Queen's Bench, 1863, in this district, when one Henry Martin was sought to be indicted for the crime of arson. The grand jury rejected the bill of indictment. He was then indicted for the crime of attempting to commit arson, upon which he was tried, convicted, and remanded to jail to await sentence. He broke jail before sentence, and escaped to the United States. He was arrested at Saint Albans, Vermont, before Commissioner Houghton, on a charge of an attempt to commit arson, and was discharged because that was not an extraditable offense. He was then charged with arson, and extradited. On the 19th of February, 1864, he was tried before the Queen's Bench for breaking jail, convicted, and sent to the penitentiary for three years, and seven years for an attempt to commit arson, of which offense he had been previously convicted. The point was taken before the court that he had been extradited for the crime of arson, and could not be tried for any other offense. This point was overruled by the judge. The Dominion government was appiled to, as well as our own, to release the man on the ground that his conviction was in violation of, or in fraud of, the Ashburton treaty. The McDonald administration sustained the ruling of the judge.

The next case was the Queen against John Paxton, at the October term of the Queen's Bench, in Montreal, 1866. The prisoner was extradited from Chicago for the alleged offense of forgery, and was put upon his trial upon a charge of uttering a forged promissory note, knowing the same to be forged. The prisoner's counsel plead to the indictment, as a matter of fact, the facts above stated; the Crown prosecutor took issue, and a jury was impaneled to try the issue of facts so joined; the jury rendered a verdict that the prisoner was extradited from Chicago upon the alleged crime of forgery. The judge ruled that he could not be tried for any other offence. Upon an appeal, however, to the court of review, a majority of the judges held that the question of fact was immaterial, reversed the decision of the judge at nici prius, and ordered the prisoner to plead to the indictment, upon which he was subsequently tried and convicted. (See Lower Canada Reports, volume 10, page 212.)

* * * * * * *

So far as relates to Canada in 1868 the Dominion government of Canada passed an act giving effect to the Ashburton treaty without the conditions contained in the imperial act, and which is still in force, and the judges here hold that they will extradite a criminal without any guarantee that he shall not be tried for any other offense, waiving, therefore, the argument that the Parliament of Great Britain cannot, by a statute, impose conditions upon a treaty foreign to its provisions, it is claimed that by the imperial act itself its conditions are expressly waived as to those treaties, then in existence, with which the imperial act would be inconsistent.

I have the honor to be, very respectfully, your obedient servant.

WILLIAM A. DART,
Consul-General.

Hon. JOHN L. CADWALADER,
Assistant Secretary of State, Washington, D. C.

No. 348.

Mr. Dart to Mr. Cadwalader.

[Extract.]

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA
FOR THE BRITISH NORTH AMERICAN PROVINCES,
Montreal, April 18, 1876.

Hon. JOHN L. CADWALADER,
Assistant Secretary of State, Washington, D. C.:

SIR: Some months since one Charles Worms was arrested in this city upon a warrant issued by Mr. Justice Ramsay, of the Queen's Bench, charged with the crime of forgery in the city of Philadelphia; a hearing was had, and said Worms remanded for extradition. His counsel sued out a writ of *habeas corpus*, returnable before Chief-Justice Dorion, where a hearing was had, and all the points were raised in the arguments that are now pending, as I understand it, between our own and the British government. The case attracted considerable attention, and our judges all consulted in reference to it. Chief-Justice Dorion decided that Worms should be remanded for extradition; that the imperial act of 1870 did not apply to the Ashburton treaty; and, if it

did apply in terms, it could not be operative against the treaty, and that when the prisoner was in the jurisdiction of the United States he could be tried for any offense. An appeal was taken in Worms's case, to the supreme court of the Dominion of Canada, which does not sit until next June—an appeal in such cases being allowed by the act creating the supreme court, and Mr. Justice Dorion declined to hold that act unconstitutional. The minister of justice, Hon. Edward Blake, was applied to to extradite said Worms, notwithstanding such appeal, and he issued his warrant for that purpose, sustaining, as I un derstand it, all the points contended for by the American Government in this controversy. Yesterday Worms was surrendered to the American officer, and is now in the United States.

* * * * * * *

I have the honor to be, sir, very respectfully, your obedient servant,

WILLIAM A. DART,
Consul-General.

No. 350.

Mr. Dart to Mr. Cadwalader.

[Extract.]

CONSULATE-GENERAL OF THE UNITED STATES OF AMERICA
FOR THE BRITISH NORTH AMERICAN PROVINCES,
Montreal, April 25, 1876. (Received April 27, 1876.)

SIR: I have the honor to state that, on examining the petition of appeal in case of Charles Worms, that that document does not raise the points material in the discussion with Great Britain. Those points were raised on the argument upon the return to the writ of *habeas corpus.*

* * * * * * *

I transmit herewith a copy of Justice Dorion's return to the supreme court of Canada in that case.

I have, &c.,

WILLIAM A. DART,
Consul-General.

PROVINCE OF QUEBEC,
District of Montreal:

Extradition case.—Treaty between Great Britain and United States.

On the application of Charles Worms for writ of *habeas corpus.*

Case submitted to the supreme court in conformity with the provisions of the 38th Victoria, chapter 11, and the rules of practice made in pursuance thereof.

The accused, Charles Worms, was arrested upon a warrant issued by the Hon. Mr. Justice Ramsay, on a complaint sworn to by one William L. Newman, a copy of which complaint will be found in the annexed appendix, number 1, upon which the said honorable judge issued his warrant, a copy of which is document No. 11 in the appendix. After the return of the warrant, certain witnesses were examined, orally, copies of whose depositions form part of the appendix, as documents numbered 2, 4, 5, 6, 7, 8, 9.

Documents were also produced purporting to be the copy of a warrant issued in the United States and copies of documents sworn to there, consisting of the deposition of the complainant and of other papers sworn to at Washington before another official, not being the person who issued the warrant. Copies of the latter documents will be found in the appendix, marked "Number 3."

The Hon. Mr. Justice Ramsay committed the said Charles Worms for extradition, and

a copy of his commitment will be found annexed to the writ of *habeas corpus*, which I issued on the fifteenth of February last on the petition of the said Chartes Worms, documents 12 and 13, respectively.

Counsel on both sides were heard before me, on the return of the writ of *habeas corpus* as to the legality and sufficiency of the commitment mentioned in the return, as also the legality of the original complaint, the warrant thereon issued, and the legality and sufficiency of the evidence upon which the said commitment was made.

The points to which my attention was chiefly directed by the objections urged by the counsel for the accused were—

* * * * * * *

I further held that the imperial act of 1870 was, by section 27 of said act, made to apply to Canada, in so far as its provisions were not inconsistent with existing treaties, with the same effect as if an order in Her Majesty's council had been passed under section 18, declaring said act to be in force in Canada and our local legislation to form part thereof; and that, as section 14 of the act of 1870 * * * * * * * * *

DEPARTMENT OF JUSTICE,
Washington, July 16, 1875.

The PRESIDENT:

SIR: I submit for your consideration the following opinion upon the petition of Charles L. Lawrence, referred to me under your direction by the Attorney-General on the 21st of May.

The case stated for your interposition is as follows:

The petitioner is a naturalized citizen of the United States, who having departed from this country without intending to return, while on his way was arrested in Ireland, during the month of March, at the instance of this Government, under the treaty of 1842, and after due proceedings was extradited, and in consequence thereof is now in the city of New York in jail. The only charge against the petitioner that was considered in the extradition proceedings was that he had *forged* the name of one Blanding to a certain bond and oath of entry in the New York custom-house.

The proceedings for extradition were under the British act of 1870.

Immediately upon his arrival in New York the petitioner was arrested, under bench-warrants issued out of the circuit court of the United States for the southern district of New York, upon charges of other forgeries, of conspiracy, &c., that had been committed before his extradition; and since such arrest a capias in a civil action, sued out of the same court, for unpaid duties owing to the United States before his extradition, has been served upon him.

Copies of the above-mentioned warrants, &c., are appended to the petition; the civil capias being in assumpsit, for $1,386,400 on account of unpaid duties.

The petitioner says that he is advised that his "surrender by the British government, as aforesaid, was made, and by arrangement with the Government of the United States was accepted, subject to the provision of the said act of 1870, which in substance declares that your petitioner shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offense committed prior to his surrender other than the extradition crime proved by the facts on which the surrender was grounded, and therefore he prays for instructions to the proper officers not to prosecute him further in such civil suit or for any crime other than the identical one upon which he was surrendered, and that he be discharged from arrest under said bench-warrants," &c.

The important question presented by the petitioner, therefore, is as

follows: Supposing a fugitive criminal to have been extradited in April, 1875, from Great Britain to the United States *under the treaty of* 1842, *and by proceedings taken under the British act of* 1870, does the latter Government recover jurisdiction over him in respect of any act, whether civil or criminal, done before such extradition other than the criminal act for which he was surrendered?

Unless under very special circumstances such a question, in the United States, is in its nature *legal* and not *political*. In other countries this is not so, but here, inasmuch as extradition is generally regulated by treaty, and as treaties are, of themselves, a part of the "supreme law," questions as to the effect of extraditions already accomplished are ordinarily questions *of law*. Questions of law cannot be determined, practically, in *civil cases*, except by the courts in which they are pending. Such questions, however, *in criminal cases pending in courts of the United States*, may receive a practical determination at the hands of the President by an order forbidding them to be further prosecuted.

If the petitioner had been surrendered by the British government because of irregular practices by the agents in his extradition, whereby that government had been misled, a question like the above might become *political* in its nature, and, therefore, cognizable by the Executive. Such practices may be included in the suggestions as to an "arrangement" made in the petition, although I suppose those suggestions to refer, at least mainly, to some *contract* binding the United States, and supposed by the petitioner to be authorized by the British extradition act of 1870.

If, therefore, the petitioner has been surrendered because of conduct upon the part of the agents in his extradition not authorized by treaty and yet involving the United States, in point of good faith and honor as its guarantor, I suppose that it is the political department of the Government that must give effect to such guarantee in all suits that may be brought against him. (See Scott's case, 8 Bam & Cress., 446.)

But if the immunity claimed by the petitioner be derived from a treaty, either taken alone or as modified by a statute of the United States, or an act of Parliament required to enforce it, it seems that its existence for practical purposes is to be determined as to the civil action of which he complains, only by the court in which that action is pending, whilst as to the criminal cases it may be determined either by such court or by the President. However, the President never interferes with a prosecution, unless the question made by the defendent is *plainly* one which will be decided in his favor by the court as soon as a trial can be reached. If there be doubt about that, the Executive leaves it to the judiciary, where such questions more properly belong.

Upon the evidence in the case made by the petitioner, no *political* question whatever arises. There is a total absence as well of proofs as of probability in favor of the suggestions tending in that direction.

The petition places the claim of Lawrence to immunity simply upon the allegation that it is expressly conferred by the British extradition act of 1870, under which were had the proceedings in his case at London. Other grounds, however, are taken in the learned and well considered briefs which have been filed in this behalf, to wit: (1) That such immunity exists *in the very nature* of extradition, under the treaty of 1842 alone. (2) That it is conceded by the United States statute of 1869, ch. 141, (Revised Statutes, sec. 5275;) and, (3) That certain conduct of those who represented the United States in the proceedings for extradition has pledged the Government to allow that immunity.

I have already dealt with the last of these suggestions, but I repeat

that there is no evidence of such conduct, or of any corresponding impression having been received by the British government, or by any of its officials. I have read the proceedings. They took place before Sir Thomas Henry, a distinguished magistrate, (and eminent authority in matters of extradition,) who is credited with having had much to do with framing the act of 1870. Both the United States and the petitioner seem to have been well represented by counsel; the former by Richard Mullens, esq., a prominent member of the English bar, whose special learning in extradition law was recognized by his being called in 1868 to testify before the special committee appointed by the House of Commons to examine and report upon the state of the law of extradition, and also to advise amendments thereto. During those proceedings, nothing occurred beyond the ordinary routine in extradition cases. Whether anything of the sort suggested by the petitioner is to be *implied* from the fact that those proceedings were under the act of 1870 will be examined hereafter.

It is quite as plain that there is nothing pertinent to the claim of the petitioner in the provisions of the United States statute of 1869, ch. 141, sec. 1, (Revised Statutes sec. 5275,) which is in these words:

"Whenever any person is delivered by any foreign government to an agent of the United States for the purpose of being brought within the United States, and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe keeping and protection of the accused."

A simple perusal of this act is enough to show that it has no application, direct or indirect, to the case of the petitioner. It certainly intimates that extraordinary attention by the Executive to the party extradited may properly be given, until his final discharge on account of the crime for which he was surrendered, and for a reasonable time thereafter; but attention to what end? The statute answers, to the end of his "safe-keeping," *i. e.*, keeping safe from escape or rescue, and also of his "security against lawless violence," *i. e.*, against mobs or the like. If Congress had intended that the party surrendered should be free during such time from also the ordinary action of the courts, this would have been the place to express it. Their silence is significant.

The above remarks leave for consideration the two principal suggestions by the petitioner: 1, that the British act of 1870 has so qualified the treaty of 1842, in practice, as to confer the immunity claimed upon all who are surrendered by means of its machinery; or, 2, that such immunity arises by necessary implication out of the treaty alone.

At the outset I remark that the act of 1870 has no bearing whatever, for the past or the future, upon *civil suits* brought for causes of action existing previously to the surrender.

Its application in any case is to "offenses" only. Therefore, the suit brought by the United States for unpaid duties will not be further considered under the present topic.

1. In Great Britain, a treaty of extradition is not of itself *law*, but requires legislation to give it effect.

Before 1870, the treaty of 1842 was rendered effective by acts that

were repealed by the act now under consideration, and since then the latter act has been the only one giving it effect. After resorting to that act in order to secure an extradition, of course the United States will give effect to any conditions which it imposes. The importance of ascertaining its meaning is therefore conceded.

That act is one of universal application, intended to supply for all extradition agreements, past or to come, the place of the special acts for each treaty theretofore in use. It refers to such agreements by the terms, *arrangements* and *treaties;* the former is the term usually employed; the latter occurs only in the 27th section. While this act was upon its passage through the House of Commons, the attorney-general, (Collier,) who was partly in charge of it, stated that the word "arrangement" was used to include not only treaties, but future agreements for extradition, less formal than treaties. (Hansard, vol. 202, p. 305.) Theretofore, extradition had been provided for only by treaty. The act affords a definition of the word, "arrangement" in some respects which is sufficient for our purposes. It is an agreement for extradition, that at all events must have gone before the proceedings which it authorizes, and have been published in an *order in council.* The fact that proceedings were taken under the act of 1870, therefore, cannot, as is suggested by the petitioner, either amount to an "arrangement" or have impressed British officials with the belief that there had been an "arrangement."

Again, the act of 1870 is divided into two parts: *one* relating to *future*, and the *other* to *past* agreements for extradition. Except for the twenty-seventh section the act would not apply to the treaty of 1842. As is usual in recent British legislation, it contains a section defining certain terms used therein. One portion of its definition of "fugitive criminal" is, *a person accused of an "extradition crime;"* and it defines "extradition crime" to be *one of the crimes described in the first schedule to this act.*

I call attention to these definitions for the purpose of showing that the provisions of the act (other than in the twenty-seventh section) are predicated upon the existence of relations betwixt Great Britain and the foreign state which avails itself of or is bound by them, *that entitled the latter to ask for a surrender on account of any of the nineteen crimes mentioned in the first schedule, whenever it becomes bound to recognize the immunity now claimed by the petitioner;* that is, excluding as yet all consideration of its twenty-seventh section, this act has no application to the relations of the United States and Great Britain, because these are relations for the surrender of fugitive criminals on account of the seven crimes of the treaty of 1842, and not on account of the nineteen crimes of the act of 1870. Except for the twenty-seventh section, proceedings for extradition by the United States would have continued to be under the acts previously passed to enforce the treaty of 1842.

Take, for example, the clause specially relied upon by the petitioner, viz: "A fugitive criminal shall not be surrendered unless provision is made by law or arrangement that, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, he shall not be detained or tried for any offense committed prior to his surrender, other than the "extradition crime." Under the definition of the terms "fugitive criminal," and "extradition crime," alluded to above, is it not evident that this clause does not apply to the case of one whose character as a fugitive depends, not upon the first schedule of the act of 1870, but upon the tenth article of the treaty of 1842? So, in the second section of the act, by which its provisions are confined to cases where an ar-

rangement has been made for the surrender of "fugitive criminals," if the *definition* be applied to that term, it is apparent that cases in which the first schedule does not apply do not, under its general provisions, come within the act.

The twenty-seventh section, therefore, is of great importance in this discussion. After expressly repealing the acts which theretofore gave effect to the treaty of 1842, that section provides as follows: "And this act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply (as regards crimes committed either before or after the passing of this act) in the case of the foreign states with which these treaties are made." That is, in applying the previous parts of the act to (say) the treaty of 1842, this section omits from such application anything in the act inconsistent with the treaty. In other words, the immunity claimed by the petitioner must be referred to the treaty considered alone, inasmuch as in all cases of difference between them the treaty controls the act, and not the act the treaty.

It is not too much to say that this is as it should be; for admitting the power of Great Britain by an act passed in 1870 to change a treaty contract made in 1842, it is not pleasant to conclude that such power has been exercised. For in such case the change has been made *without notice* to the United States; a circumstance which, in connection with the treaty of 1842, (expressly providing, as that does, for its own avoidance by short notice from either party,) might involve not only a want of courtesy toward the United States, but a want of that perfect good faith which the petitioner very properly desires to be observed by the United States toward Great Britain. There has been in this case no want of perfect good faith upon the part of either government or upon that of the officials of either; but it is apparent that if the case of legislation by Great Britain and of proceedings by the United States had been as conceived by the petitioner, reclamations by the former government against the latter on the score of ill-faith might be attended with special complications.

The view taken above as to the 27th section is confirmed by the language of the Court of Queen's Bench in Bouvier's case. (27 Law Times Rep., 844; 42 Law Journal Rep., Common Law, 17; 12 Cox Cr. Cas., 303.) Bouvier was a French fugitive, demanded in 1872, under the extradition convention of 1843 between France and Great Britain, effect to which had, before 1870, been given by the same acts that had given effect to the treaty of 1842.

The treaty contained no clause granting immunity, but the proceedings against Bouvier had been taken under the act of 1870. The case therefore is so far on all fours with the present. During the proceedings (in the island of Jersey) a suggestion by the fugitive that upon surrender he might be tried in France for old offenses other than the extradition crime, was met by proof that by the French domestic law he could be tried only for that crime. In the Queen's Bench the attorney-general, (Coleridge,) who represented the French government, on that part of the case relied not only on the above proof, but also greatly upon the point that that restriction upon jurisdiction over fugitives did not by the 27th section apply to the convention with France. The proof rendered it unnecessary to decide the latter point, as in either event Bouvier would be surrendered; but the court (Cockburn, Blackburn, and Mellor) conceded that Parliament had *intended* so to provide, and inclined to think that their words had effected such purpose. They, however, suggested further legislation to clear up the doubt; but al-

though an amendatory act has since been passed. that point was left untouched. We may suppose that the attorney-general, as member of Parliament, differed with the judges upon the necessity of amending language which as one of the introducers of the bill he had probably closely considered in 1870. Indeed, it seems that if that language was sufficient to draw from the lord chief justice the expression, "*I see plainly* that was the intention of the legislature—that is to say, it was intended while getting rid of the statutes by which the treaties were confirmed to save the existing treaties *in their full force and effect*," (Bouvier's case, L. T., p. 846,) it is sufficient for all purposes.

The earnestness with which the distinguished counsel for Lawrence has pressed the suggestion that what the court in Bouvier's case were in doubt about was whether the convention with France had not been *abrogated entirely*, and not whether it had *been saved* in its *full force and effect*, renders it necessary to say that this cannot be so; because Bouvier was *demanded* under the convention, and the court had no hesitation in ordering his surrender. To make his surrender possible, it was necessary not only that there should be a machinery-act like that of 1870, but also a treaty, or an arrangement authenticated by an order in council. The report states that there was in existence no other convention for extradition on which the surrender could be based.

I conclude that the British extradition act of 1870 has no bearing upon the question raised by the petitioner.

II. I come now to consider whether the treaty of 1842 taken, alone, warrants the petitioner in his claim for immunity.

It is not contended that the treaty confers that immunity expressly. As is well known, the extradition provision therein is one of great simplicity, and specifies no more that that the two governments will thereafter, upon due requisition, mutually "deliver up *to justice* all persons who being charged with the crimes of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum or shall be found within the territory of the other." Therefore the only question remaining is, whether, when the treaty was made, the parties thereto understood that after surrender fugitives would be liable only for the crime made out in the proceedings therefor. Such understanding might appear in the correspondence between the negotiators of the treaty, or the debates in Congress and Parliament, or in subsequent action by courts in cases affecting persons surrendered.

No reference to the present topic is contained in such correspondence or debates, or, as I am informed, in any subsequent diplomatic correspondence between the two Governments; and the decisions of the courts in the two countries, so far as they can be traced, are (without an exception) to the effect that fugitive criminals are *not* entitled to such immunity.

It is to be remarked that the language of the treaty is probably that of the American negotiator, Mr. Webster, a gentleman familiar with the practice in cases of surrender of fugitives from justice between the States, and desirous that, as to the offenses named in the treaty, that practice should be extended especially to fugitives escaping beyond the long neighboring Canada line. The simple, pregnant expression in the treaty, requiring fugitives to be delivered "*to justice*"—neither more nor less—was probably suggested by the parallel expression in the Constitution, which describes those who are to be surrendered between the States as those who flee "from justice." The opinion of Judge (afterwards Mr. Justice Nelson) in Williams vs. Bacon, 10 Wendell, 636, ex-

presses briefly what I believe has been the uniform American doctrine upon this subject. In that case, a fugitive had been surrendered (by Massachusetts to New York) on a charge of obtaining goods by false pretenses. After surrender he was arrested in a civil suit. On moving for his discharge from arrest, *as being a breach of public faith*, his counsel said: "On the requisition of the governor of this State, he has been delivered up by the governor of another State to answer to a criminal charge—not to be subjected to arrests here on civil process." To this Judge Nelson said: "There is no pretense that the criminal proceeding in this case was a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civiliter*. The argument of the defendant's counsel in this particular is not supported by the facts of the case. Had such facts appeared, the defendants would have been discharged. As it is, the motion is dismissed, with costs."

I believe that it will not be disputed that according to American domestic international law, fugitives *from justice*, when *bona fide* returned *to justice*, are returned to it without any qualifications arising out of the fact that they had almost succeeded in committing a fraud upon its jurisdiction by flight. I say when *returned bona fide*, because it is beyond doubt that no jurisdiction can arise, in case the government which made the surrender have been induced to do so by deceit. I will add that the recognition of the above rule of jurisdiction, in the relations of so many intelligent, well-ordered communities, affords a strong presumption that it is not immoral, or in any sense contrary to first principles; and also that as the relations between foreign governments become more and more free from collateral obstructions, (one of which I shall mention before I conclude,) this will become more and more the rule in all extraditions.

The cases in which American courts have held that persons surrendered under the treaty of 1842 were liable for other offenses than the extradition crime, are those of Caldwell (8 Blatchford, 131) and Burley, (Clarke on Extradition, 2d ed., p. 90, N.; also, Report of British Extrad. Comm., 1868, pp. 53 and 60.) In Adriance *vs.* Lagrave, (American Law Register, May, 1875,) the court of appeals of New York held the same doctrine as to a fugitive arrested in a civil suit, although the extradition was discredited as having been "ostensibly" for a crime.

The above are the only American cases on this subject which I have met; that of Sanford *vs.* Chase, 3 Cowen, 381, cited by the petitioner, is not in point.

Resting upon the above uncontradicted practice and decisions, as proof that it is the universal understanding of the authorities in the United States, that fugitives, when surrendered *to justice*, without more being said, are surrendered thereto generally, absolutely, and simply, I will now inquire whether the British doctrine differs therefrom.

The special extradition committee of the House of Commons referred to above, consisted of eighteen persons, among whom were some of the most distinguished public men of the empire, viz: Messrs. Bouverie, Layard, Walpole, W. E. Forster, Stansfield, J. S. Mill, Sir Francis Goldsmid, Sir R. P. Collier, and the solicitor-general.

Their labors issued in the enactment of the law of 1870. In order to obtain particular information upon the topic of extradition they summoned before them, and examined as experts, Sir Thomas Henry, E. A. Hammond, (the permanent under secretary of state for foreign affairs,) Mr. Mullens, and others. I have looked carefully through the proceedings and report of the committee. The evidence taken by them is re-

ported at length. At the time of his examination, Mr. Hammond had been in public office continuously for forty-five years, and had been under secretary since 1854. I think that it must be conceded that any statement by him of the English view of the matter, especially when acquiesced in by the eminent men of various shades of political belief, before whom it was made, must be accepted as correct. Mr. Hammond called the attention of the committee to Burley's case (cited above) as one in which an American court had proceeded to put a fugitive surrendered by Great Britain upon trial for an offense other than the extradition crime, and stated that whilst it was pending the matter had been referred to the law-officers of the Crown, and that they had held that he might be so tried; at another point he expresses his own personal opinion as being to the same effect. (Questions 1032 and 206.) The former passage in his evidence is as follows: "The question was referred to the law-officers in this country, and it was held that if the United States put him *bona fide* on his trial for the offense in respect of which he was given up, it would be difficult to question the right to put him upon his trial also for piracy, or any other offense which he might be accused of committing within their territory, whether or not such offense was a ground of extradition, or even within the treaty." No exception was taken to either statement, although several members of the committee made remarks thereupon. I suppose that the requirement therein of a *previous bona-fide trial for the extradition crime*, is due to the circumstance that the case submitted went upon that hypothesis, in which event, of course, the opinion would conform to such special feature. It seems plain, inasmuch as the *bona fides* of the extradition is the important matter, that, in the absence of a treaty rendering a certain sort of evidence thereof exclusively admissible, any pertinent evidence is competent. A previous trial is plain and high, *but not the only*, evidence of *bona fides* in the previous proceedings for extradition.

In the minutes of the committee it is also stated that one Heilbronn having been surrendered by the United States to Great Britain for forgery, and acquitted thereof, was afterward put upon trial by the latter for a *larceny* committed at the same time, and was convicted. (Question 1152, &c.) Paxton's case in Canada is to the same effect. My attention has been called to these and some of the cases cited above by Mr. Clarke's Treatise on Extradition.

A moment's attention to the argument in Bouvier's case (above) will show that the court assumed that previously to the act of 1870, the French treaty of 1843, (and so, of course, the American treaty of 1842,) sanctioned trials for offenses previous to surrender other than the extradition crime.

I understand these cases to be uncontradicted in Great Britain, and therefore that the executive and judicial authorities of that government agree with those of the United States in pronouncing against the existence of the immunity claimed by the petitioner under the treaty of 1842, considered alone.

Upon the whole I am of opinion:

I. That as there has been no promise or conduct by any person who represented the United States in the proceedings for the petitioner's extradition which modifies the operation of the treaty upon his present condition, that condition is here a question of *law*, not of *policy*.

II. Therefore, that the President cannot interfere in the civil suit pending against the petitioner; and

III. That no ground has been laid for an order to discharge the pe-

titioner from further prosecution upon the criminal matters specified in the petition.

Inasmuch as, according to the views of this Government, extradition is wholly a matter of *positive* international law, I have confined the above discussion to the relations *actually* existing betwixt the United States and Great Britain. I have therefore omitted to remark upon the French domestic regulation of 1841, by which this immunity is provided for fugitives extradited to France. For the same cause, it seems unnecessary, except incidentally, to refer to the circumstance that the similar feature in the British act of 1870 is due, not to a conviction that it is proper in itself, but to a desire to prevent all chance that a fugitive may be demanded for one offense and then tried, besides, for an offense in its nature *political*. (Hansard, vol. 202, p. 302; Report Extrad. Comm., question 666, &c.) The reason for inserting so sweeping a provision, to effect an object so limited, may be gathered from the minutes of the committee of 1868. Briefly stated, it is that, as nations differ upon what constitutes a *political* offense, the benefit of the British view thereupon can be secured to fugitives only by providing that they shall be triable for no offenses except such as have been previously scrutinized by British officials.

The provision of 1870 is therefore, so to say, collateral, and announces no general principle in international law.

As the general ideas of *government* and *justice* which prevail in Great Britain and the United States preserve the likeness due to a not remote common origin, nothing, either past or apprehended, has suggested to either party the propriety of putting an end to the extradition agreement of 1842 *by notice*, as provided in the eleventh article of the treaty. This would be a natural and easy step toward the introduction of a stipulation like that in the act of 1870. As regards each other, therefore, these powers prefer the agreement of 1842 to the one last mentioned, which, however, each of them has of late adopted in arrangements with some other states. Until something has occurred to render either of these powers apprehensive that political offenders cannot be protected against the other, unless by restricting jurisdiction to the extradition crime, the rule of the treaty of 1842 will probably remain in force. In the mean time, that upon a proper occasion the Government of the United States will either suggest or will consent to such a restriction is shown by its recent treaties with Italy, 1867, and Nicaragua, 1868. (Statutes at Large, vol. 15, p. 629, and vol. 17, p. 815.)

I am, sir, very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

[Extract.]

United States circuit court, southern district of New York.

THE UNITED STATES
vs.
CHARLES L. LAWRENCE.

MARCH 27, 1876.

BENEDICT, J.:

This case comes before the court upon a demurrer interposed by the Government to a rejoinder filed by the defendant.

The proceedings commence with an indictment, charging the accused with several offenses—all being forgeries—alleged to have been com-

mitted within the jurisdiction of this court, and all by statute offenses against the United States. * * * *

In disposing of the questions argued before me upon this demurrer, I first notice the position taken that all extradition proceedings by their nature secure to the person surrendered immunity from prosecution for any offense other than the one upon which his surrender is made.

This question is not open in this court. It was decided in Caldwell's case, (8 Bla., p. 131.) That determination has since received strong support from the decision of the court of appeals in this State, in Adriance vs. Lagrave, (59 N. Y., p. 115,) where the existence of any such immunity was denied in a civil case, and it should be noticed that the present circuit judge of this circuit took part in the decision of the court of appeals, being then a member of the court. This ground of defense is therefore dismissed with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all times and everywhere liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm.

But here it has been contended that the accused has such immunity by reason of the provisions of the treaty of 1842, under which his surrender was made, which it is correctly said is a law of the United States, binding upon the courts.

The decision of Caldwell's case is decisive of this question also, for Caldwell was surrendered under the treaty of 1842. But as no argument was made in Caldwell's case based upon the provisions of this particular treaty, the argument now made in support of this construction of the treaty may properly now be examined.

At the outset, let it be noticed that no language is used in the treaty which can be supposed to confer the immunity here claimed. On the contrary, the language of the treaty is calculated to repel the idea, for it declares that the offender shall be "delivered up to justice." A significant and comprehensive expression, plainly importing that the delivery is for the purposes of public justice, without qualification.

It is, however, argued that both the parties to this treaty have placed a construction upon its provisions which confers the immunity for which the accused contends, and reference is made to acts of Congress of 1869 and of 1848, (U. S. Rev. Statutes, § 5272 to § 5275,) and to the British extradition act of 1870, as supporting the assertion.

The act of Congress of 1848 is a general law intended for the protection of extradited offenders, but the protection it confers is expressly limited to cases of "lawless violence."

It is true that it assumes, as well it may, that the offender will be tried for the offense upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses in a statute, having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the act of 1848, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused.

So of the act of 1848, the provision of which relied upon is as follows: It shall be lawful for the the Secretary of State to order the offender "to be delivered to such person as shall be authorized in the name and on the behalf of such foreign government to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly."

It does not seem reasonable to suppose that it was the intention of Congress, by the above language, to give a legislative construction to the existing treaty of 1842.

The provision of the act of 1848 is within the broad provision of the treaty, but does not restrict the operation of that provision, and it may be safely assumed that if the intention to limit the effect of or give a construction to that, or if any other treaty had been entertained, assuming such a function to belong to a statute of this character, that intention would have been plainly expressed.

The acts of Congress referred to, therefore, fail to afford a legislative construction of the treaty in the particular under consideration.

It is still more difficult to find support for the doctrine of the defense in the provisions of the British extradition act of 1870.

How can it be that, without any action on the part of the treaty-making power of the United States, the Parliament of England, by a statute of England, passed 28 years after the treaty of 1842, can engraft upon that treaty a provision of immunity not found in the treaty, and which must thereafter be enforced by courts as part of the laws of the United States?

The effect proper to be given by the executive department of the Government to any condition found in an extradition statute of England to which the Government of the United States has assented in any particular case, is not under consideration. Here the question is judicial, and it is whether the British act of 1870, by reason of its subject-matter, becomes a law of the United States, and as such affords a legislative construction of this treaty binding upon the courts of the United States.

Upon such a question no time need be spent, and it is dismissed with the observation that it would appear that the English courts incline to the opinion that the act of 1870 has no effect in England even to limit the operation of the treaty of 1842, as is seen by the opinions delivered in the court of Queen's Bench, in Bouvier's case. (27 Law Times R., p. 844.)

The words of the lord chief-justice in that case are, "I see plainly that it was the intention of the legislature, that is to say, it was intended (by the act of 1870) while getting rid of the statutes by which the treaties were confirmed to save the existing treaties in their full force and effect."

Nor is it made to appear that any such construction of the treaty of 1842 has been adopted by the executive department of either Government.

An agreement for such immunity in the present instance is set up by the plea.

But it is competent for the Government of the United States to enter into such an agreement with the government of England in the absence of any provision for immunity in the treaty. And the demand for such an agreement on the one side, as well as the giving thereof on the other, leads to the inference that no such protection is afforded by the treaty itself. A single instance of such an agreement does not, therefore, help the argument.

The understanding of the treaty by the executive department is better shown by the action taken or omitted in the cases that have arisen where there has been no agreement. So in the case of Heilbronn, who was surrendered by the United States, upon the request of England, for an extradition crime, a trial was had in England for an offense not provided for in the treaty, without interference by the executive there, and without complaint from the Government of the United States. So, also,

Burley, an offender surrendered by England to this Government, was put upon trial in this country for an offense other than the one upon which he was extradited; and the case being called to the attention of the law-officers of the Crown, it was considered that "if the United States put him *bona fide* upon his trial for the offense in respect of which he was given up, it would be difficult to question the right to put him upon his trial, also, for piracy, or any other offense which he might be accused of committing within this territory, whether or not such offense was a ground of extradition or within the treaty."

No case has been referred to where the right above spoken of has been questioned by the British government. On the contrary, if I am correctly informed such right has not hitherto been denied in England.

As to the effect of the fact of a previous trial for the offense of which the offender was given up, to which allusion is above made, it is plain that such fact is immaterial in determining the judicial question where legal immunity is set up by way of defense in a prosecution for other offenses, however important that fact might be, as evidence of good faith in determining the political question when it arises.

It may be added that the action of the executive department of the Government of the United States, in the cases where extradited offenders have beeen tried in this country for offenses other than those upon which their surrender had been asked, has a significant bearing upon the legal question under consideration, because, in criminal cases, as distinguished from civil cases, the Executive, by reason of the power to pardon, is not confined to a consideration of the political question alone, but may also act upon a determination of the judicial question.

But it is further said that the British act of 1870 amounts either to an abrogation of the extradition section of the treaty of 1842, or to a modification of the provision, and inasmuch as by the eleventh section the government of Great Britain could at any time abrogate that portion of the treaty, the act of 1870, if considered by the Government of the United States as an abrogation, would have been so declared, and in the absence of such a declaration must be considered to be acquiesced in by the Government of the United States as its construction of the treaty, and becomes a part of the treaty binding upon the courts.

This proposition is answered by what has been already said in regard to the effect of the British act of 1870, and the action of the Government of the United States in the cases which have hitherto arisen.

Moreover, if the action of the two governments and the act of 1870 be given the utmost effect possible in favor of the accused, all that can be extracted from them is an implied engagement to afford protection to persons extradited in pursuance of the treaty from prosecution for causes other than upon which their surrender was asked, which addresses itself to the political not to the judicial department. It is not intended to suggest that such can be their effect, but simply to express the opinion that in any aspect they have no greater effect, and in view of the language of the treaty cannot be relied on as affording a legislative or executive construction of that instrument binding upon the courts.

It may, therefore, without hesitation be declared that the claim of legal immunity here made is without foundation in the treaty of 1842. In support of this conclusion reference is made to the authority of the court of appeals of the State of New York, which high court in Lagrave's case was called on to declare the effect of this same treaty.

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